

REFUGEE CHILDREN IN MALAYSIA AND THE CUSTOMARY INTERNATIONAL LAW

By

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ABSTRACT

The interest in embarking on this study is prompted by the predicament of refugee children under Malaysian jurisdiction and the dire need to improve their situation. This thesis is aimed at investigating the applicability of two rules relating to refugee protection: the principle of non-refoulement and the best interests of the child, which are believed to have become customary international law (CIL) which binds all states without their consent. The focus of this thesis is the prolonged problem of refugee children's protection and the possibility of improving their conditions using international law while acknowledging that Malaysia is not a party to the 1951 Convention Relating to the Status of Refugees. The thesis begins by discussing the international refugee protection regime and the position of the CIL mechanism; this will be followed by a discussion of the Malaysian legal framework to show the gap between international law and domestic law relating to refugees. The next focus of attention is the general condition of refugee children in Malaysia and the treatment accorded to them by the authorities. Their unpleasant condition explains the link between the absence of law and their protracted situation. The next task is to examine whether or not the two principles have attained CIL status; the thesis also considers the duties of the state under the two rules, the persistent objector rule, and the application of the principles and the obligation that accompanies them as CIL in the domestic courts. Lastly, the conclusion and recommendation are presented at the end of this thesis. Noting that local resources and literature on this subject are limited, this thesis will contribute to the existing body of knowledge on this matter and provide an interesting argument to advocate legal reform to improve refugee protection in the country.

I dedicate this thesis to my husband,

Zesdyzar Rokman

To my parents,

Imam Supaat Abdul Rahman and Masijah Abdul Kadir

To my parents in law,

Rokman bin Bahrom (deceased) and Zainab binti Baharuddin,

And to my children,

Najmi, Najihah, Nazhif, Nafiz and Nabilah.

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Am. Soc'y Int'l L. Proc.	American Society of International Law Proceedings
AALCO	Asian-African Legal Consultative Organization
AJIL	American Journal of International Law
Am. J. Int'l L.	American Journal of International Law
Ariz. J. Int'l & Comp. L.	Arizona Journal on International and Comparative Law
Asia-Pac. J. on Hum. Rts. & L.	Asia-Pacific Journal on Human Rights and the Law
Aust. YBIL	Australian Year Book of International Law
Austl. Int'l L.J.	Australian International Law Journal
BIC	Best Interests of the Child
B. C. Third World L. J.	Boston College Third World Law Journal
B.U. Pub. Int. L.J.	Boston University Public Interest Law Journal
Bus. Times	Business Times
Buff. Hum. Rts. L. Rev	Buffalo Human Rights Law Review
BHRC	Butterworth's Human Rights Cases
Cap. U. L. Rev.	Capital University Law Review
CAT	Convention Against Torture
Chi. J. Int'l L.	Chicago Journal of International Law
Chicano-Latino L. Rev.	Chicano-Latino Law Review
Child. Legal Rts. J.	Children's Legal Rights Journal
Chinese J. Int'l L.	Chinese Journal of International Law
Colum. Hum. Rts. L. Rev	Columbia Human Rights Law Review

Cornell Int'l. L. J.	Cornell International Law Journal
CRSR	1951 Convention Relating to the Status of Refugees
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
Denv. U. L. Rev.	Denver University Law Review
E.J.M.L	European Journal of Migration and Law
E.L. Rev.	European Law Review
Emory Int'l L. Rev	Emory International Law Review
Eur. J. Migration & L	European Journal of Migration and Law
Fletcher F. World Aff	Fletcher Forum of World Affairs
FMR	Forced Migration Review
Fordham L. Rev.	Fordham Law Review
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Geo. Immigr. L.J.	Georgetown Immigration Law Journal
Geo. J. on Fighting Poverty	Georgetown Journal on Fighting Poverty
Geo. Wash. J. Int'l. L. & Econ.	George Washington Journal of International Law and Economics
Goettingen J. Int'l L.	Goettingen Journal of International Law
Harv. Int'l L. J.	Harvard International Law Journal
Harv. J. L. & Pub. Pol'y	Harvard Journal of Law & Public Policy
Harv. L. Rev	Harvard Law Review
Hong Kong L.J.	Hong Kong Law Journal
Hous. J. Int'l L.	Houston Journal of International Law
Human Rts Journal	Human Rights Journal
IJRL.	International Human Rights and Refugee Law

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILPA	Immigration Law Practitioners' Association
Ind. J. Global Legal Stud	Indiana Journal of Global Legal Studies
Int J Psychiatr Nurs Res	International Journal of Psychiatric Nursing Research
Int. J. Law, Policy and Family	International Journal of Law, Policy and the Family
Int'l & Comp. L. Q.	International and Comparative Law Quarterly
Int'l J. Child Rts.	International Journal of Children's Rights
Int'l J. Legal Info	International Journal of Legal Information
Int'l J. Refugee L	International Journal Of Refugee Law
Interdisc. J. Hum. Rts. L.	Interdisciplinary Journal of Human Rights Law
Int'l J. Child. Rts.	International Journal of Children's Rights
J. Int'l Crim. Just.	Journal of International Criminal Justice
J. Refugee Stud.	Journal of Refugee Studies
J.I.A.N.L	Journal of Immigration Asylum and Nationality Law
J.R.S.	Jesuit Refugee Service
Man. L. J.	Manitoba Law Journal
Mich. J. In'l L	Michigan Journal of International Law
MLJ	Malayan Law Journal
Mod. L. Rev.	Modern Law Review
Immigr. & Nat'lity. L. Rev	Immigration & Nationality Law Review
Nev. L.J.	Nevada Law Journal

Newcastle L. Rev	Newcastle Law Review
NR	<i>Non- refoulement</i>
Nordic J. Int'l L.	Nordic Journal of International Law
Nordisk Tidsskrift Int'l Ret	Nordisk Tidsskrift for International Ret
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
Ohio St. L.J.	Ohio State Law Journal
P	Page(s)
Para	Paragraph(s)
P.L.R.	Pepperdine Law Review
Psychiatry, Psychol. & L.	Psychiatry, Psychology and Law
RSD	Refugee status determination
Scandinavian Stud. L.	Scandinavian Studies in Law
Stan. J. Int'l L	Stanford Journal of International Law
St. Louis U. L.J.	Saint Louis Universtiy Law Journal
St. Louis U. Pub. L. Rev.	Saint Louis University Public Law Review
Student B. Rev	Student Bar Review
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Commerce,
UK	United Kingdom
U. Malaya L. Rev.	University of Malaya Law Review
U. Miami Inter-Am. L. Rev.	University of Miami Inter-American Law Review
U. Miami L. Rev.	University of Miami Law Review
U.N.S.W.L.J.	University of New South Wales Law Journal

UCLA Pac. Basin L.J.	UCLA Pacific Basin Law Journal
UN	United Nations
UNGA	United Nations General Assembly
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
Va. J. Int'l L.	Virginia Journal of International Law
Va. J. Soc. Pol'y & L.	Virginia Journal of Social Policy & the Law
Val. U. L. Rev.	Valparaiso University Law Review
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Virginia J. Int'l L.	Virginia Journal of International Law
Wash. L. Rev.	Washington Law Review
Whittier L. Rev.	Whittier Law Review
Yale Hum. Rts. & Dev. L.J.	Yale Human Rights & Development Law Journal
Yale J.L. & Feminism	Yale Journal of Law and Feminism

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CHAPTER 1

GENERAL INTRODUCTION

1.1 INTRODUCTION

In an ideal setting, where the international protection regime for refugees is fully adopted or incorporated and then enforced by a state whose domestic laws provide sufficient safeguards, asylum-seeking children will not be detained¹ and their application for refugee status will be processed by a body set up by the authority, with the possibility of appeal.² Once recognised as refugees, refugee children will be treated without discrimination³ and issued with paperwork on their identity⁴; they will enjoy freedom of movement⁵ and equal treatment as nationals of the receiving country.⁶

¹ United Nations Convention on the Rights of the Child, Article 37 (b): “States Parties shall ensure that: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

² Such as in Canada, see Immigration and Refugee Board of Canada, ‘Refugee Appeal Division’ (Immigration and Refugee Board of Canada) <<http://www.irb-cisr.gc.ca/Eng/RefApp/pages/RadSar.aspx>> accessed 3 Sept 2012; and the United Kingdom, see UK Border Agency, ‘Appeals’ (UK Border Agency)< <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/appeals/>> accessed 3 Sept 2012.

³ 1951 Convention Relating to Status of Refugee, Article 3: The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

⁴ 1951 Convention Relating to Status of Refugee, Article 27: The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

⁵ 1951 Convention Relating to Status of Refugee, Article 26: Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

⁶ 1951 Convention Relating to Status of Refugee, Article 16: ‘1. A refugee shall have free access to the courts of law on the territory of all Contracting States. 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*. 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.’

Article 22: 1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. 2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in

Therefore, there must be a reason why refugee children continue to find themselves in a complicated situation in Malaysia considering it has been hosting a large number of refugees since the 1970s and, thus, has vast experience. Notwithstanding the unrelenting criticism from many factions concerning its treatment of refugee children, Malaysia's authorities have been constantly defending their actions and decisions.⁷ This defence is further buttressed by vigorous claims regarding Malaysia's status as a non-contracting state to the 1951 Convention Relating to the Status of Refugees (CRSR) and the fact that Malaysia's domestic legal framework does not recognise refugee children. Instead, they are classified as illegal immigrants.

With a view to providing better protection for refugee children in the country, this study looks at the applicability of two principles of customary international law (CIL) relating to refugees, i.e. the *non-refoulement* rule and the principle of the best interests of the child. The CIL requires no state consent and, thus, should its customary status be proven, the rules would become binding on Malaysia provided that the Malaysian legal framework contained nothing to the contrary.

particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23: The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

⁷ Sumisha Naidu, 'Malaysia Finds 'Conflict' in UN Refugee Convention' ABC Radio Australia (12 Nov 2012) <www.radioaustralia.net.au/international/2012-11-12/malaysia_finds_conflict_in_un_refugee_convention/1044934> accessed 20 Feb 2013.

This chapter will describe the background of this research and introduce the research questions. First, it presents the general scenario of refugee children in Malaysia and briefly explains the compelling reasons for undertaking this research and the reason for making refugee children the subject of the study. This is followed by a discussion on the scope of the research. Next, the aims, research questions and objectives of the study are clarified and the study's approach is explained. Finally, the chapter sets out the limitations of this study. The dissertation is structured in this form to allow a more focused discussion.

1.2 GENERAL SCENARIO

Malaysia is a sovereign state practicing constitutional monarchy system comprising of thirteen states and three federal territories. It is located at the heart of the Southeast Asian region. It consists of a peninsular also known as West Malaysia separated by the South China Sea from East Malaysia, an island, which is also referred to as the Borneo where Sabah and Sarawak is situated. The peninsular shares land border with the southern part of Thailand in the northern part, while Sabah and Sarawak share borders with Kalimantan, Indonesia; Brunei and Philippines. Figure 1 below shows Malaysia's territory; the peninsular where the capital city, Kuala Lumpur lies and the state of Sabah and Sarawak; and Malaysia's international land and maritime borders. Malaysia's location, its neighbouring countries in the region including Thailand, Singapore, Brunei, Indonesia, Philippines, Cambodia, Laos, Vietnam and Burma/Myanmar are shown in Figure 2. Most refugees and asylum seekers are living in Kuala Lumpur and other main cities in the peninsular as well as Kota Kinabalu, Sandakan, Tawau, and Lahad Datu in Sabah.



Figure 1 Map of Malaysia⁸

⁸ Malaxi, 'Malaysia Map Collection Directory' (Malaxi)
 <http://www.malaxi.com/maps/malaysia_map.gif> accessed 20 Sept 2014.

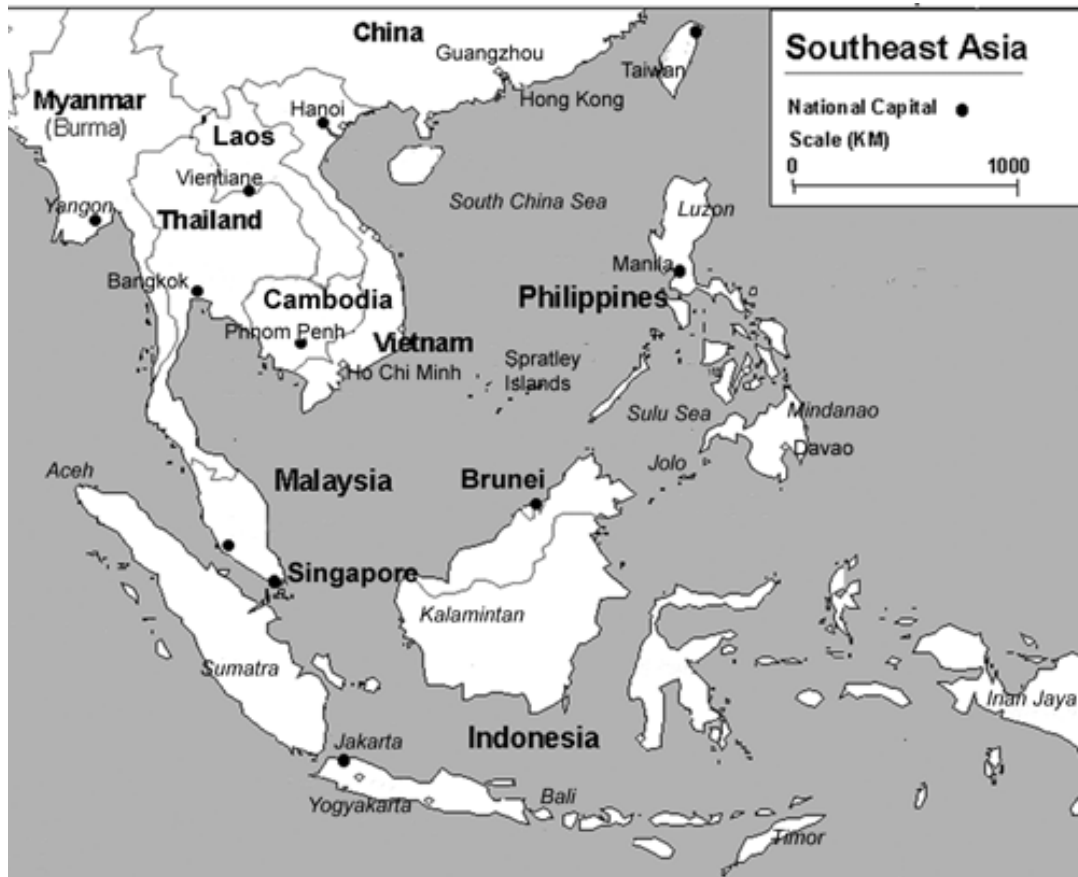


Figure 2 Map of Southeast Asia⁹

In general, forced migrants in search of shelter in Malaysia are being regularly assured of three things: that they are admitted to the country on humanitarian grounds; that protection and assistance are provided as humanitarian gestures; and that their stay in the country is only temporary.¹⁰ No assurances are given regarding the solution of any issue and nothing has ever

⁹ The Internationalist, 'The Class War in Southeast Asia' (The Internationalist) <<http://www.internationalist.org/seasiamap.gif>> accessed 20 Sept 2014.

¹⁰ State leaders and ministers responsible for immigration have repeatedly stated Malaysia's humanitarian and temporal stand on refugees. See Hussein Onn, 'Policy Towards Illegal Migrants' (1979) 2 Foreign Affairs Malaysia 216- 219; SHM SNS MB MAM, 'Malaysia Helps "Refugees" on Humanitarian Ground' *New Straits Times* (Kuala Lumpur, 2 July 2007) 7; National Security Council, 'Refugee' (*National Security Council*, May 2009) <http://www.mkn.gov.my/v1/index.php/en/mkn-focus/focus_transnational-security> accessed 15 March 2010; __ 'No Political Asylum or Refugee Status for Illegals' *The Star Online* (Kuala Lumpur, 25 Oct 2007) <<http://thestar.com.my/news/story.asp?file=/2007/10/25/parliament/19267734&sec=parliament>> accessed 12 Aug 2008; __ 'No Political Asylum for Illegal Immigrants, Says Syed Hamid' *Daily Express*

appeared to persuade the government to change its stance on the significant number of children who have crossed international borders with their families or on their own to escape various forms of persecution, wars, generalised violence, severe human rights violations, political conflict, civil strife, and natural disasters in their countries of origin, and who are currently seeking refuge in Malaysia. Simply described by the authority as 'illegal immigrants,' refugee children from the Philippines, Indonesia, Myanmar, Nepal, Sri Lanka, Somalia, Iraq and Afghanistan are known to have been seeking sanctuary in the country.¹¹

In the past, from the 1970s to the 1990s, Indochinese children fleeing the communist takeover of Vietnam, the Vietnamese invasion of Cambodia and the hostilities of the Sino-Vietnamese war¹² were only granted temporary refuge before being returned to their countries of origin or resettled in other countries.¹³ Conversely, children who have escaped civil unrest in the Southern Philippines since 1975 have been allowed to remain permanently in Sabah.¹⁴ Today,

News (Sabah, Malaysia, 7 Sept 2003) <<http://www.dailyexpress.com.my/news.cfm?NewsID=21456>> accessed 3 Nov 2010; and ___ 'Foreigners Having Refugee Status Warned' *Daily Express News* (Kota Kinabalu, Malaysia, 12 Dec 2003) <<http://www.dailyexpress.com.my/news.cfm?NewsID=23498>> accessed 3 Nov 2010. In Bernama, 'Najib: For Malaysia to decide and Not UNHCR' *Daily Express News* (Sabah, 4 March 2005) <<http://www.dailyexpress.com.my/news.cfm?NewsID=33021>> accessed 3 Nov 2010, the then Deputy Prime Minister stressed that the authority will definitely take action against illegal immigrants even when they have UNHCR documents.

¹¹ UNHCR Malaysia, *Basic Facts (UNHCR Malaysia, 2010)* < <http://www.unhcr.org.my/cms/basic-facts/statistics>> accessed 1 Nov 2010. Also note that forced migrants from the Philippines and Indonesia are no longer considered refugees by the UNHCR Malaysia. This will be separately discussed with reference to each refugee group in Section III of this chapter including the intricacies and legal complications facing each group. The Malaysian law makes no distinction between refugees and illegal immigrants, causing them to be lumped together as 'offenders' having violated the law of the country through various offences including illegal entry, illegal stay and invalid travel documents.

¹² Valerie O'Connor Sutter, *The Indochinese Refugee Dilemma* (Louisiana State University Press, London 1989) 50.

¹³ As one of the largest forced migration events in the world, the Indochina crisis has involved not only neighbouring countries in the region but also industrialised countries in the West as countries of resettlement.

¹⁴ See Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield,

the number of refugee children currently in Malaysia has reached nearly 30,000.¹⁵ These internationally displaced children have been uprooted by forces beyond their control, which have caused them to suffer serious infringements of their human rights, threats to life and liberty, and denial of the basic necessities of life¹⁶ but they are treated differently from one another. They form part of the alien or migrant community in this country but what has distinguished them from the rest of the migrant population¹⁷ is the fact that they have been forced to migrate and involuntarily leave home for a foreign state in search of a safe haven because their own countries or governments have failed or refused to provide protection from the causes of the forced movement.¹⁸

The absence of written law regulating and recognising refugees as refugees has negative implications for the treatment granted to the groups in Malaysia. In the current legal setting, refugee children fleeing various forms of persecution in their countries of origin have been accorded uncertain status, inconsistent protection and limited rights by the Malaysian authorities, despite having been present within its borders for almost four decades.¹⁹ In the

1987) p. 257; and Vitit Muntarbohn, *The Status Of Refugees In Asia* (Clarendon Press, London 1992) 113- 120.

¹⁵ (UNHCR Malaysia, Figures at a Glance (UNHCR Malaysia, 2014) <http://www.unhcr.org.my/About_us-@-Figures_At_Glance.aspx)

¹⁶ Section III of this chapter will give details on the underlying causes of forced migration movement from Indochina, Myanmar, Indonesia and the Philippines to Malaysia.

¹⁷ Besides those who are forcibly displaced, a huge number of economic migrants who have voluntarily left their home countries in search of better economic opportunities and social life are also present in Malaysia. Refugees are usually grouped together with economic migrants, a group that includes illegal migrants.

¹⁸ The absence of protection from the country of origin for its people and citizens against persecution and the persecutors is an important element of refugeehood. Situations where there is protection but the person is unwilling or unable to avail himself of such protection for good reason may amount to non-protection, especially when the perpetrator of the persecution is the state or state agent itself.

¹⁹ Forced migrants are admitted to the country on humanitarian grounds, protection and assistance are given as a humanitarian gesture, and their stay in the country is only temporary. See Hussein Onn, 'Policy Towards Illegal Migrants' (1979) 2 Foreign Affairs Malaysia 216- 9; __, 'Malaysia Helps "Refugees" on

absence of formal and written recognition and protection from the Malaysian government, and since Malaysia has not acceded to or ratified the 1951 Convention Relating to the Status of Refugees, the office of the United Nations High Commissioner for Refugees (UNHCR) utilises its mandate to process and identify genuine refugees in Malaysia by issuing them with UNHCR identity papers.²⁰

Unfortunately, these documents do not fully safeguard them from an array of discriminatory treatment, abuse and violence because inherently, under Malaysian law, refugees are not legally distinguished from economic migrants and they constitute a group committing offences against the law, being categorised as ‘illegal immigrants’ under the Immigration Acts 1959/1963 if they are in breach of its provisions for valid entry and stay and thus subject to criminal penalties.²¹ Agencies such as the Immigration Department and the *Ikatan Relawan Rakyat Malaysia* (RELA), a community-based voluntary army acting in their power under the Essential (Emergency Service) (Volunteer Armed Forces) Regulations 1964²², continue to arrest refugees who will then be detained at the Immigration Detention Depot, sometimes

Humanitarian Grounds’ *New Straits Times* (Kuala Lumpur, 2 July 2007) 7; National Security Council, ‘Refugee’ (*National Security Council*, May 2009) <http://www.mkn.gov.my/v1/index.php/en/mkn-focus/focus_transnational-security> accessed 15 March 2010; __ ‘No Political Asylum or Refugee Status for Illegals’ *The Star Online* (Kuala Lumpur, 25 Oct 2007). <<http://thestar.com.my/news/story.asp?file=/2007/10/25/parliament/19267734&sec=parliament>> accessed 12 Aug 2008; __ ‘No Political Asylum for Illegal Immigrants, Says Syed Hamid’ *Daily Express* (Sabah, Malaysia, 7 Sept 2003) <<http://www.dailyexpress.com.my/news.cfm?NewsID=21456>> accessed 3 Nov 2010; and __ ‘Foreigners Having Refugee Status Warned’ *Daily Express* (Kota Kinabalu, Malaysia, 12 Dec 2003) <<http://www.dailyexpress.com.my/news.cfm?NewsID=23498>> accessed 3 Nov 2010. In Bernama, ‘Najib: For Malaysia to decide and Not UNHCR’ *Daily Express* (Sabah, 4 March 2005) <<http://www.dailyexpress.com.my/news.cfm?NewsID=33021>> accessed 3 Nov 2010, the then Deputy Prime Minister stressed that the authorities will definitely take action against illegal immigrants even when they have UNHCR documentation.

²⁰ UNHCR Malaysia, ‘Protection’ (UNHCR Malaysia) <http://www.unhcr.org.my/What_We_Do-@-Protection.aspx> accessed 5 Sept 2013.

²¹ Immigration Acts 1959/1963, Section 6.

²² After much criticism and alleged abuse of power, the power to detain and arrest was later revoked in the new Act, the Malaysia Volunteers Corps Act 2012 (Act 752).

prior to deportation and sometimes indefinitely unless and until the UNHCR office intervenes.²³ These incidents are the reflection of a clear linkage between the non-existence of law, the exclusive dependence on the discretionary administrative powers of the authorities, such as policies introduced to deal with refugees, and the conflicting actions of the enforcement personnel against refugees. In response to negative reporting and comments, Malaysia has nevertheless shown the world that it continues to accept refugees and is able to respond well to emergency calls despite its vocal rejection of the Refugee Convention. The recent rescue of Rohingya refugees whose boat was sinking in Malaysian waters is one of those humanitarian gestures consistent with the principle of *non-refoulement* shown by the government.²⁴ Currently, there are also plans to register refugees, including refugee children, to keep their data in the government database. This move may protect UNHCR card holders from detention and deportation.²⁵

²³ Amnesty International, 'Abused and Abandoned: Refugee Denied Rights in Malaysia' (*Amnesty International*, 15 June 2010) ASA28/010/2010, 13-14 <<http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16>> accessed 14 Sept 2010.

²⁴ UNHCR Malaysia, "UNHCR Lauds Malaysia for Rescuing Myanmar Persons from Sinking Boat" (UNHCR Malaysia, 11 March 2013) accessed at < http://www.unhcr.org.my/News_Views-@-PressReleaseMSRescueSinkingBoat.aspx> 20 May 2013.

²⁵ Wani Muthiah et al., 'Working for Refugee Rights: Joint Efforts with UNHCR to Register Asylum Seekers to Ensure Their Protection' *The Star* (Kuala Lumpur, 7 Nov 2011) 2. However, in 2012, a report said that the community-based registration for Chin refugees would be discontinued as the UNHCR believed that some Chin community organisations were charging the refugees for the exercise. See Chin Human Rights Organisation, 'UNHCR to Discontinue Refugee 'Biodata' Collection in Malaysia' (2012) XV (IV) *Rhododendron News*, 10.
< <http://www.chro.ca/index.php/publications/rhododendron/80-rhododendron-2012/413-rhododendron-news-Sept-volume-xv-issue-v-Oct-201228>> accessed 14 Dec 2012. However, the project was then revived in 2013. See Chin Human Rights Organisation, 'UNHCR to Register Asylum Seekers From Burma In Malaysia' (2013) XVI (IV) *Rhododendron News*, 21.
< http://www.chro.ca/images/stories/files/PDF/Rhododendron/RhododendronNews_Jul-Aug_2013.pdf> accessed 5 Sept 2013.

The condition of refugee children in Malaysia is a matter of concern for various parties who have argued that, as a strategy for the advancement of refugee rights and protection, Malaysia should first and foremost ratify the 1951 Convention Relating to the Status of Refugees (CRSR), the main legal instrument in the international protection regime for refugees.²⁶ However, from the perspective of the Malaysian government, this call is contrary to its values: it is not in its economic and social interests; it raises various issues of security; and it is a threat to its sovereignty.²⁷ After so many years, Malaysia continues to offer the same justifications and there is no indication of the possibility of ratification.²⁸ Therefore, it is unrealistic to anticipate that Malaysia will become a contracting state to the CRSR in the near future.

The other proposition is to prove Malaysia's obligation under the CIL, which requires no ratification or state consent. The principle of *non-refoulement* and the best interests of the child are two rules that many believe have become international customs that might benefit refugee children. Based on time factors, the gravity of the refugee children's condition, and the need to urgently improve their protection, the second suggestion is considered more reasonable and, most importantly, more feasible. Besides their capacity to provide protection for refugee children, the implementation and application of the two principles will perhaps

²⁶ A total of 145 countries have become contracting states to the CRSR and Malaysia has been lobbied to ratify the CRSR by the UNHCR and other NGOs. When it becomes a contracting state, Malaysia will have to comply with all the requirements of the CRSR, including recognising the rights of refugees and its obligations to refugees.

²⁷ Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinuss Nijhoff Publisher, Leiden 2008) 6- 15.

²⁸ Sara E. Davies, in *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinuss Nijhoff Publisher, Leiden 2008), claims that Southeast Asian states will continue to justify their rejection of the international refugee law using various lines of argument.

indirectly benefit adult refugees. Moreover, the concern here is to protect refugee children - the most vulnerable group within the refugee community - as soon as is practicable to avoid any further detrimental effects. Nevertheless, it is of the utmost importance to examine whether or not the current legal framework in Malaysia will allow the application of the said rules in court.

1.3 WHY REFUGEE CHILDREN?

In a country where no specific law for refugee protection is available, the wellbeing of all refugees alike is at stake. Without any protection framework, asylum seekers and refugees are often at risk of being unfairly treated by the authorities and the community. However, within the refugee colony, there is one particular group of individuals who are affected more than others by any shortcomings in the law and other hardships: refugee children.²⁹ The main reason for choosing refugee children as the subject of this study is their invisibility, not only within the refugee community³⁰ but also within the community of the host country at large.³¹ They usually hide from the enforcement agencies and shy away from the local community to avoid arrest and unwanted attention. At the same time, lack of real protection has caused the authorities to ignore the important requirement to record refugee children and their families on

²⁹ Being a child, a minor or an underage person in the refugee world does have his/her own advantages. Previously, children below the age of 15 were given priority for resettlement in the United States during the Indochinese refugee era. See E. Diane Pask and Anne Jayne, 'Refugee Camps and Legal Problems: Vietnamese Refugee Children' (1984) 22 *J. Fam. L.* 546, 548. In the UK, refugee children are entitled to state care and financial assistance until they reach 18 years of age. See, for instance, Charles Watters, *Refugee Children Towards the Next Horizon* (Routledge, London, 2008) 71- 2.

³⁰ Tara L. Kinch, *Linking Invisibility and Vulnerability: Strengthening Refugee Child Protection Capacity: The Case of Unaccompanied and Separated Refugee Children from Bhutan Living in Nepal* (Master's Thesis , Saint Mary's University 2008) 59- 60.

³¹ Jacqueline Bhabha, "More than their Share of Sorrows": International Migration Law and the Rights of Children' (2003) 24 *Immigr. & Nat'lity. L. Rev.* 301- 322, 302- 303. Also see Gillian Mann, *Not Seen or Heard: The Lives of Separated Refugee Children in Dar es Salaam* (Save the Children, Sweden 2003) 12, 42. The author explains that the illegal and clandestine nature of the refugee children's presence in the city has caused them to remain concealed and hidden to avoid the authorities.

an official register.³² In Malaysia, literature on refugee children is usually found only on the UNHCR website³³ but rarely in scholarly work. Children are either commonly mentioned as “women and children” or left out entirely when the term “men and women” is used.³⁴

The other reason is their vulnerability compared to adult refugees and ordinary citizens’ children.³⁵ The invisibility of refugee children is linked to their vulnerability; for example, they are invisible because they are vulnerable to harsh enforcement of the law, and when they become invisible they become more vulnerable since they are not on the radar of protection.³⁶ Studies have shown that refugee children are subject to additional traumatic conditions at all phases of forced migration.³⁷ Their positions as children and refugees make them more

³² The UNHCR keeps a biometric registration of refugees and asylum seekers in Malaysia to verify identities of refugees and catch fraudulent applicants. See UNHCR, “Fingerprints Mark New Direction in Refugee Registration” (UNHCR Malaysia, 10 Oct 2012) < http://www.unhcr.org.my/News_Views-@-Fingerprints_mark_new_direction_in_refugee_registration_.aspx >

³³ www.unhcr.org.my

³⁴ Bruce Abramson, *The Invisibility of Children and Adolescents: The Need to Monitor Our Rhetoric and Our Attitudes*, in Eugeen Verhellen (Ed), *Monitoring Children’s Rights* (Kluwer Law International, Netherlands 1996) 393-402, 394, 398

³⁵ UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994) <<http://www.refworld.org/docid/3ae6b3470.html>> 1 accessed 20 May 2008; PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (PICUM, Brussels 2008) 6; and Matthew Happold, “Excluding Children From Refugee Status: Child Soldiers and Article 1F on the Refugee Convention” (2002) 17 *Am. U. Int’l L. Rev* 1131- 1176, 1138. Many refugee children were kidnapped and then conscripted as soldiers against their will.

³⁶ Nigel Thomas and John Devaney, ‘Safeguarding Refugee and Asylum Seeking Children’ (2011) 40 *Child Abuse Review* 307, 307; and Tara L. Kinch, *Linking Invisibility and Vulnerability. Strengthening Refugee Child Protection Capacity: The Case of Unaccompanied and Separated Refugee Children from Bhutan Living in Nepal* (Master’s Thesis, Saint Mary’s University 2008) 59- 60.

³⁷ As shown in some literature: Israel Bronstein & Paul Montgomery, “Psychological Distress in Refugee Children: A Systematic Review” (2011) 14 *Clin Child Fam Psychol Rev* 44-56; Cecile Rousseau & Aline Drapeau, ‘Are Refugee Children an At-Risk Group? A Longitudinal Study of Cambodian Adolescents’ (2003) 16 *J. Refugee Stud.* 67- 82; and Rebecca Raymond, “The Mental health Impacts of Trauma on Refugee Young People and Therapeutic Interventions Promoting Resilience” *Hopes Fulfilled or Dreams Shattered? From Settlement to Settlement Conference* (2005) www.crr.unsw.edu.au/media/File/Refugee_Resilience.pdf > accessed 5 Apr 2008

susceptible to various risks and dangers.³⁸ Their vulnerability is also due to their naivety, dependency and inability to fend for themselves.³⁹ Their dependence on their parents, guardians, and care-givers, and their lack of maturity and knowledge influence their ability to care for themselves or make informed decisions. Refugee children are indeed in need of continuous support from adults (parents and other family members) to deal with affairs affecting them and to exercise their rights. Their vulnerability, dependency and limited capacity expose them to child-specific persecution such as child military conscription, forced labour, trafficking, genital mutilation and sexual exploitation.⁴⁰ Moreover, at any stage of the refugee cycle, children are at risk of exploitation, manipulation, harassment, neglect and abuse. As such, they are at further risk of suffering from mental and physical health problems.

By comparison, due to their limited capacity and ability to cope with agony and hardship, the effects of violation and denial of refugee rights are more severe on children than on adults, and other domestic circumstances will have a direct impact on them. For instance, serious repercussions can result from the denial of rights for parents, such as the ban on them taking up gainful employment, which will affect the survival of the refugee children and their families. Without sufficient resources, parents cannot bring food home for the family, and

³⁸ See Nigel Thomas and John Devaney, "Safeguarding Refugee and Asylum-seeking Children" (2011) 20 *Child Abuse Review* 307- 310, 307; and Alice Farmer, "Refugee Responses, State-like Behavior, and Accountability for Human Rights Violations: A Case Study of Sexual Violence in Guinea's Refugee Camps" (2006) 9 *Yale H.R. & Dev. L. J.* 44-103, discussing the vulnerability of refugee women and girls to sexual violence and exploitation in refugee camps and the lack of access to justice; and Wendy A. Young, 'The Protection of Refugee Women and Children Litmus Test for International Regime Success' (2002) 3 *Geo. J. Int'l Aff.* 37- 44, discussing lack of protection and security for refugee children and women.

³⁹ UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994) <<http://www.refworld.org/docid/3ae6b3470.html>> 1 accessed 20 May 2008.

⁴⁰ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, Para 8.7.

access to healthcare and education will be restricted. Consequently, their full development, welfare and enjoyment of rights, such as right to education and access to healthcare, will also be affected. When refugee children are denied access to education, they become more vulnerable, because education is a tool for restoring their hope and dignity, and building their future; there are also scores of unaccompanied and separated refugee children who are more vulnerable than those who are accompanied by their parents, guardians or carers. The other challenges facing refugee children include the following: being accused of pretending to be children;⁴¹ being mistakenly identified as illegal immigrants who have violated the law of host states⁴² and are perceived as a threat to states' security and social stability; being seen as a burden on social and health services;⁴³ and being denied international protection or refugee status because of their alleged role as combatants.⁴⁴

The conditions and challenges stated above lead to trepidation and concern for their survival and entitlements as children⁴⁵, especially when the number of refugee children continues to increase. Global statistics for 2007 show that children below the age of 18 years account for

⁴¹ Bhabha, J., 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework'. (2008) Innocenti Discussion Paper No. 08/3. UNICEF ; and Smythe, J. A., "I Came to United States and All I Got Was This Orange Jumpsuit" Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform" (2004) *Child. Legal Rts. J.* 28, 32.

⁴² Carla L. Reyes, "Gender, Law, and Detention Policy: Unexpected Effects on the Most Vulnerable Immigrants" (2010) 25 *Wis. J. L. Gender & Soc'y* 301-331,

⁴³ See for instance see Alica Nah and Tim Bunnell, "Ripples of Hope: Acehese Refugees in Post- Tsunami Malaysia (2005) 26 (2) *Singapore Journal of Tropical Geography* 249- 256; and Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) p. 257; and

⁴⁴ Matthew Happold, "Excluding Children from Refugee Status: Child Soldiers and Article 1F on the Refugee Convention" (2002) 17 *Am. U. Int'l L. Rev* 1131- 1176, 1140- 1143.

⁴⁵ The preamble to the United Nations Convention on the Rights of the Child 1989 acknowledges that children should enjoy their rights, be given assistance, protection and care, treated without discrimination and brought up in family environment in order to maintain their dignity and fully develop.

about 46 per cent of the total refugees and people in refugee-like situations.⁴⁶ In 2012, the number of refugees stood at 10.4 million⁴⁷, with almost 7.4 million children below 18 years of age, which is more than 70% of the total refugee population.⁴⁸ In Malaysia, the office of the United Nations High Commissioner for Refugees reports that, as of October 2010, children made up around 19,200 (21%) of the total of 91,100 refugees and asylum seekers registered with the Kuala Lumpur office, and it is estimated that the number of persons of concern to UNHCR in 2010 living within Malaysian borders who are not registered with the international body is around 10,000 people.⁴⁹ By August 2013, around three years later, the number of refugees and asylum seekers had increased to 108,336; around 25,000 of them were children below the age of 18, which is about 23%. Meanwhile, the number of unregistered asylum seekers was recorded at 49,000 people.⁵⁰

In short, refugee children are a grave concern in this study since they are not treated as children first⁵¹ and the way the authority treats many of them is detrimental, damaging to their

⁴⁶ See UNHCR, '2007 Global Trends Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Person' (*UNHCR Statistical Online Population Database*, 17 June 2008) < <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>> 12, accessed 17 Dec 2008

⁴⁷ UNHCR, 'Figures At A Glance' (UNHCR, 5 Sept 2013) <http://www.unhcr.org/pages/49c3646c11.html> accessed 5 Sept 2013

⁴⁸ UNHCR, 'UNHCR Population Statistics- Demographics' (UNHCR, 5 Sept 2013) <popstats.unhcr.org/PSQ-DEM.aspx> accessed 5 Sept 2013

⁴⁹ UNHCR Malaysia, 'Statistics' (*UNHCR Malaysia*, 9 Dec 2010) <<http://www.unhcr.org.my/cms/basic-facts/statistics>> accessed 9 Dec 2010.

⁵⁰ UNHCR Malaysia, 'Figures At A Glance' (UNHCR Malaysia, 5 Sept 2013) <www.unhcr.org.my/About_Us-@-Figures_At_A_Glance.aspx> accessed 5 Sept 2013.

⁵¹ Alice Nah, "Refugee and Space in Urban Areas in Malaysia" (2010) 33 *FMR* 29- 29; Alica Nah and Tim Bunnell, "Ripples of Hope: Acehese Refugees in Post-Tsunami Malaysia (2005) 26 (2) *Singapore Journal of Tropical Geography* 249- 256. Every child refugee has different needs based on many factors associated with their life and experience in their country of origin, their flight, arrival, and treatment in the host country. See for instance UNHCR, 'Meeting the Rights and Protection Needs of Refugee Children An Independent Evaluation of the Impact of UNHCR's Activities' (2002) EPAU/2002/02 <http://www.refworld.org/docid/4cbd4f652.html> accessed 19 Sept 2008; and Daniela Reale, *Away From Home Protecting and Supporting Children on the Move* (Save the Children, UK 2008) 7-21

development and contrary to the principle that children are rights holders.⁵² Specific attention to refugee children in scholarly works shows the gravity of their condition that must be addressed as soon as possible.⁵³

1.4 WHY CUSTOMARY INTERNATIONAL LAW?

For many commentators, customary international law is a threat to state sovereignty due to its nature of compelling states to fulfil their obligations under international law involuntarily.

<http://www.savethechildren.org.uk/sites/default/files/docs/Away_from_Home_LR_1.pdf> accessed 5 May Sept 2009.

⁵² Numerous writers have dedicated their studies to the vulnerability of unaccompanied and separated children; to name a few, Javier Barraza, 'Violation of the Rights of Unaccompanied Immigrant Children in the United States and the Need for Appointed Counsel' (2005) 25 *Child. Legal Rts. J.* 24; Carolyn J. Seugling, 'Towards a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States' (2004) 37 *Vand. J. Transnat'l L.* 861- 895; Geraldine Sadoway, 'Canada's Treatment of Separated Refugee Children', (2001) 3 *E.J.M.L.* 347- 381; Simon Russell, *Most Vulnerable of All: The Treatment of Unaccompanied Refugee Children in the UK* (Amnesty International United Kingdom, UK 1999); and Samuels, H., 'Unaccompanied Vietnamese Children in Hong Kong: Child Victims in Refugee-Like Situations' (1994) 6 *Journal of Child Law* 75-81.

⁵³ Various works on the psychological aspect, mental health, welfare and treatment of refugee children suggest that they need special attention due to their vulnerability and traumatic experience and condition. See for instance Marina Ajduković, 'Psychological Well-Being Of Refugee Children' (1993) 17 (6) *Child Abuse & Neglect* 843-854; Kjerstin Almqvist, 'Refugee children in Sweden: Post-Traumatic Stress Disorder in Iranian preschool children exposed to organized violence' (1997) 21 (4) *Child Abuse & Neglect* 351-366; Blake, Caroline; Ademi, Xhevat, 'Albanian Refugee Children.' (1998) 17 (1) *Multicultural Teaching* 8-13; Montgomery, E., 'Refugee Children From The Middle East' (1998) *Scandinavian Journal Of Social Medicine. Supplementum*; V. Papageorgiou, A. Frangou-Garunovic, R. Iordanidou, W. Yule, P. Smith, P. Vostanis, 'War Trauma And Psychopathology In Bosnian Refugee Children' (2000) 9 (2) *European Child & Adolescent Psychiatry*, 84-90; Stuart L. Lustig, Maryam Kia-Keating, Wanda Grant Knight, Paul Geltman, Heidi Ellis, J David Kinzie, Terence Keane, & Glenn N. Saxe. 'Review of Child and Adolescent Refugee Mental Health' (2004) 43 (1) *Journal of the American Academy of Child & Adolescent Psychiatry* 24-36; Abdel Aziz Mousa Thabet, Yehia Abed and Panos Vostanis, 'Comorbidity of PTSD And Depression Among Refugee Children During War Conflict' (2004) 45 (3) *Journal of Child Psychology and Psychiatry* 533- 542; Kimberly A. Ehntholt and William Yule, 'Practitioner Review: Assessment and treatment of refugee children and adolescents who have experienced war-related trauma' (2006) 47 (12) *Journal of Child Psychology and Psychiatry* 1197-1210; Huegler, Nathalie, and Karen Lyons. "Separated Refugee Children" in Doreen Elliot & Uma Anand Segal (eds) *Refugees Worldwide (ABC- CLIO: 2012)* 235-266; Patricia Del Valle, 'Traumatized Refugee Children' (2002) *Best Practice In School Prevention And Intervention* 599-614; Matthew Hodes, 'Psychologically Distressed Refugee Children in the United Kingdom' (2000) 5 *Child Psychology and Psychiatry Review*, 57-68; Vaage AB, Thomsen PH, Rousseau C, Wentzel-Larsen T, Ta TV, Hauff E. 'Paternal Predictors Of The Mental Health Of Children Of Vietnamese Refugees' [2011] 5 (2) *Child Adolesc Psychiatry Ment Health*; Reed RV, Fazel M, Jones L, Panter-Brick C, Stein A, 'Mental Health Of Displaced And Refugee Children Resettled In Low-Income And Middle-Income Countries: Risk And Protective Factors' (2012) *Lancet* 250- 265; and Meyer S, Murray LK, Puffer ES, Larsen J, Bolton P, The Nature And Impact Of Chronic Stressors On Refugee Children In Ban Mai Nai Soi Camp, Thailand. (2013) 8 (9) *Global Public Health* 1027-1047.

This makes the law less democratic than treaties.⁵⁴ CIL is also considered as interference in state prerogatives because, from the state perspective, states undeniably reserve the right to take any action they think fit for their citizens and territory, including border security. Despite the conflict, this study argues that the CIL is a good and viable ground for improving the protection of refugee children in Malaysia. The main reasons for opting to support the application of customary law principles in this country rather than pursuing the ratification of the CRSR can be explained as follows.

Firstly, were it to be proved that the two rules - the principle of *non-refoulement* and the best interests of the child - have become international custom, Malaysia would be automatically bound by the principles unless Malaysia's persistent objection could be shown. Despite being the subject of constant debate for its allegedly uncertain sources, premises, contents, uses and compliance,⁵⁵ CIL retains its distinctive feature as a tool for binding states without consent, especially when there is a compelling need to induce states to act in accordance with international law as soon as possible.

Secondly, the ratification of the CRSR cannot single-handedly solve the problem of protection in Malaysia. This is mainly because records have shown that, as Malaysia is a dualist state, a

⁵⁴ John O. McGinnis, The Comparative Disadvantage Of Customary International Law (2006) 10 *Harvard Journal Of Law & Public Policy* 1, 11.

⁵⁵ Andrew T. Guzman, Saving Customary International Law (2005) 27 *Mich. J. Int'l L.* 115, 123; J. Patrick Kelly, The Twilight of Customary International Law (2000) 40 *Va. J. Int'l L.* 449, 450; Jack L. Goldsmith & Eric A. Posner, Understanding the Resemblance Between Modern and Traditional Customary International Law (2000) 40 *Va. J. Int'l L.* 639, 640.

very long time may elapse before the CRSR can be made domestically enforceable by the Parliament via incorporation by statute. The previous treaty, the UNCRC, was ratified in 1996 but only some of its provisions were incorporated in the Child Act 2001; the rest are not enforceable because they are not yet incorporated into any statute and no enabling statute has been enacted. Thus, it is illogical and impossible to imagine that the CRSR will be treated any differently from the UNCRC. Furthermore, the ratification of the CRSR will not necessarily improve the protection of refugees unless it is coupled with the authorities' full commitment to giving effect to state obligation accompanied by full and prompt implementation of the refugee convention. The third argument concerns the fact that Malaysia has no intention of ratifying the CRSR for various reasons; this is discussed in Chapter 3, which addresses Malaysia's rejection of the treaty. Consequently, it is totally impractical to wait for the ratification.

Based on the above argument, this study takes the view that it is more feasible to make the most of Malaysia's existing international obligations to persuade the country to remedy the harmful environment it offers refugee children and fill the legal vacuum, rather than attempting to press for ratification, an effort that has been futile for the last four decades. A better approach would be to investigate Malaysia's international obligations under the customary international law relating to refugees, i.e. protection against return, or the principle of *non-refoulement*, and protection under the principle of the best interests of the child. This of course depends on whether the CIL can be applied in local courts. This question is dealt with in Chapter 7.

1.5 SCOPE OF RESEARCH

This study focuses on refugee children and two legal principles believed to have reached customary status: *non-refoulement* and the best interests of the child. The term ‘refugee children’ used in this study includes all internationally displaced children who are forced to leave their countries of origin or habitual residence and are currently seeking refuge in Malaysia.

Their background is irrelevant as long as their departure to Malaysia is not voluntary. In Malaysia the term ‘refugee’ has come to be used to refer to asylum seekers and recognised refugees under the UNHCR mandate. No distinction is made between children who are ‘technically’ refugees according to the CRSR and those who do not fall under the CRSR classification, such as environmental refugees and people escaping generalised violence, or between children who are currently under the mandate of the UNHCR office, those whose applications to the UNHCR are being considered, and those who have not applied for refugee status to the UNHCR. Such distinctions serve no purpose as Malaysia has not ratified the CRSR. The scope extends to all refugee and asylum-seeking children in Malaysia, be they accompanied or unaccompanied or separated children (children who are alone without their parents or adult care-givers).⁵⁶ Such inclusion is justified because the researcher does not want any child to be disregarded as all refugee children share some form of common difficulties.⁵⁷

⁵⁶ Although no agreed legal definition of unaccompanied refugee children exists, this study adopts the definition provided by the UNHCR.

⁵⁷ At times, those who are accompanied by their parents are in better position when it comes to certain issues. However, on many occasions, problems faced by adult caregivers may consequently affect children under their care too. See, for instance, Marisa Silenzi Cianciarulo, ‘The W Visa: A Legislative

For brevity, the term ‘refugee children’ is used to refer to children coming to Malaysia as a result of forced displacement, including a) those who have applied for refugee status with the UNHCR and are waiting for a decision, b) those who have been recognised as refugees or persons of concern by the UNHCR, and c) those who have been refused refugee status but whose return is impossible for security reasons. Children in the first and second categories are currently relying on the mandate of the United Nations High Commissioner for Refugees (UNHCR) office for protection.⁵⁸

1.6 AIM OF STUDY

The situation and predicament of refugee children under Malaysian jurisdiction and the pressing need to rectify the problems set out above have sparked the interest in conducting this research. Taking the concerns of the government and plights of the asylum seekers and refugees into consideration, this study aims to investigate potential ways of applying international standards for the protection of refugee children in Malaysia without the ratification of the CRSR. The investigation involves the examination of the applicability of

Proposal for Female and Child Refugees Trapped in a Post- Sept 11 World’ (2005) 17 *Yale J.L. & Feminism* 459- 500, 461. Here, the ordeal of a female Somali refugee in Kenya was highlighted. She had been a refugee for 11 years when she was raped by a police officer who patrolled the refugee camp; she was then abandoned by her husband, with six children to look after and an elderly mother. Having lost hope of resettlement, she left the refugee camp with the children, taking them out of the protection system.

⁵⁸ Refugee children, as referred to by the CRSR and as non-technically termed, are entitled to international protection derived from different sources of law, and for a displaced child to be entitled to the protection he/she will inevitably have to meet and fulfil the criteria specified. The categories and the criteria reflect the complication constantly hovering over internationally displaced children when it comes to the determination of status, the protection they should receive and the enjoyment of rights. International protection in this regard refers to the protection regime provided under international treaties such as the 1951 Convention Relating to the Status of Refugees and the office of the United Nations High Commissioner for Refugees (UNHCR) or other bodies mandated to protect refugees and persons in refugee-like situations. The term ‘protection’ in relation to refugees consists of various forms, levels and needs depending on, for example, the nature of the refugees’ flight, age, gender and country of asylum. See Guy S Goodwin-Gill, ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’ in Jaap Doek et al., *Children on the Move: How to Implement Their Right to Family Life* (Martinus Nijhoff Publishers, Netherlands 1995) 97-108, 98.

two customary international law rules, the principle of *non-refoulement* and the best interests of the child, from two perspectives, i.e. the international law and domestic law perspectives. This study argues that, if the two principles are in fact international custom, it is necessary to determine whether international custom is recognised as a source of law in Malaysia. Furthermore, the study seeks to confirm whether the customary international law might legally bind Malaysia and its domestic courts in order to compel the authorities to fulfil their duties in international law for the improvement of the protection of refugee children in its territory.

1.6.1. Research Questions

The study is guided by the following research questions:

- a. What is the treatment accorded by the authorities to refugee children in Malaysia?
- b. Have the principles of *non-refoulement* and the best interests of the child become rules of customary international law and are they binding on Malaysia?
- c. What are the state's obligation towards refugee children under the customary principles of *non-refoulement* and the best interests of the child?
- d. If the two principles are indeed international customary law, are they legally applicable in the Malaysian courts?

1.6.2. Research Objectives:

- a. To examine the extent to which refugee children are being protected under the Malaysian legal system;

- b. To analyse the customary status of the principles of *non-refoulement* and the best interests of the child and the operation of the persistent objector rule;
- c. To identify the duties of state under the customary rules of *non-refoulement* and the best interests of the child;
- d. To examine the applicability of the principles of *non-refoulement* and the best interests of the child as international customs in Malaysian courts; and
- e. To recommend improvements in the law and practice relating to the protection of refugee children.

1.7 SIGNIFICANCE OF STUDY

The significance of this study lies in its moderate approach to persuading the Malaysian government to improve the situation of refugee children in Malaysia by providing evidence of their predicament and Malaysia's violation of international law. This study believes that there is no 'one size fits all' approach to dealing with the refugee problem. While acknowledging that Malaysia is not in a position to ratify the CRSR,⁵⁹ this study recommends that the country focus on the development of a protection mechanism operating outside the CRSR, i.e. the complementary protection that might be based on the CIL and the United Nations Convention on the Rights of the Child (CRC), to address the critical needs of refugee children. This approach is taken because the ratification of the CRSR is not a single guarantee that refugee

⁵⁹ From remarks and comments made by Malaysian political leaders when responding to refugee protection issues. See for instance ___, 'Rais: We Have No Intention to Codify Laws on Refugees, Asylum Seekers' *New Straits Times* (Kuala Lumpur, 25 Oct 2003), 3; and ___, 'Malaysia Not Planning to Join UN Convention on Refugees', *New Straits Times* (Kuala Lumpur, 17 Apr 2007) 12.

rights will be preserved and protected, as the commitment of the state is equally important to ensure meaningful implementation of the CRSR.

Studies on whether human rights treaties are effective in improving the human rights practices of a country have shown that state ratification of human rights treaties is not associated with better human rights practice. It has been suggested that countries that ratify human rights treaties are less likely to comply with treaty requirements than countries that do not.⁶⁰ At this juncture, the CRSR cannot be viewed as the panacea to resolve the problem of protection. Considering that there is no indication of when Malaysia might ratify the CRSR, and that its ratification would provide no guarantee of Malaysia actually conforming to its requirements, it is proposed that promoting compliance with existing obligations under the CIL is a more practicable approach for Malaysia. The combination of Malaysia's international obligations under various sources of law would make a good protection framework for refugee children, but in this study the scope is limited to CIL.

This study is also timely and relevant as it seeks to suggest an improvement to the legal framework capable of ensuring that refugee children's temporary period of residence in Malaysia will contribute towards recognising their rights and meeting their needs. It is hoped that this study will add to our knowledge about alternative legal measures that might be

⁶⁰ Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935, 1989. Other relevant studies are Emilie M Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: Paradox of Empty Promises' (2005) 110 (5) *American Journal of Sociology* 1373-411; and Eric Neumayer, 'Do International Human Rights Treaties Improve Respect For Human Rights?' (2005) 49 (6) *The Journal of Conflict Resolution*, 925-53.

employed by non-contracting states to safeguard the rights of refugee children seeking refuge in developing countries. Apart from that, this study will contribute towards finding the means to encourage other states to comply with international obligations. It is also hoped that the study will enrich our understanding of two other aspects: first, the risks that refugee children are facing in states without national legislation for refugees; and second, the long-term benefits of securing the rights of refugee children – benefits to the children themselves, the host country and indeed the whole world.

1.8 IMPACT OF THE STUDY ON PREVIOUS RESEARCH

This study is also current, as demonstrated by the number of papers presented from this research as listed below:

1. Dina Imam Supaat (2013) ‘Refugee Children under the Malaysian Legal Framework’ UUM 7th International Legal Conference, 13- 14 November 2013 (Putrajaya, Malaysia).
2. Dina Imam Supaat (2013) “Customary International Law for Refugees and Its Applicability in the Malaysian Courts”. Syariah and Law Discourse 22 May 2013 (Nilai, Negeri Sembilan).
3. Dina Imam Supaat (2013) “Escaping the Principle of Non-Refoulement”, Kuala Lumpur International Business, Economics and Law Conference, 8-9 April 2013 (Kuala Lumpur).
4. Dina Imam Supaat (2012) “The Principle of the Best Interests Of The Child as the Basis of State Obligation to Protect Refugee Children in Malaysia”. Kuala

Lumpur International Business, Economics and Law Conference, 3-4 December 2012 (Kuala Lumpur).

5. Dina Imam Supaat (2012) “The Rights and Legal Status of Refugee Children in Malaysia”. FSU Academic Discourse, 28 November 2012 (Nilai, Negeri Sembilan)
6. Dina Imam Supaat (2012) “The Principle of the Best Interests Of The Child as the Basis to Protect Refugee Children in Malaysia”. Syariah and Law Discourse, 13 September 2012 (Nilai, Negeri Sembilan).
7. Dina Imam Supaat (2012) “The Extent to which Refugee Children in Malaysia are being Treated as Children First”, International Seminar on Syariah and Common Law, 3-6 March 2012 (Nilai, Negeri Sembilan).
8. Dina Imam Supaat (2009) “Challenges to Dignity, Pride and Self-Esteem: Refugee Women and Children in Refugee Camps and Temporary Host Country’, ROLES Seminar, 9 December 2009 (Birmingham, UK).
9. Dina Imam Supaat (2009) ‘Charting the Course for the Protection of Refugee Children’s Rights: the Malaysian Experience’, SLSA Annual Conference, 7-9 April 2009 (Leicester, UK).
10. Dina Imam Supaat (2008) ‘Rights of Refugee Children in Malaysia: What We Protect and What We Should Protect’ Birmingham Law School Postgraduate Seminar, 31 Oct 2008 (Birmingham, UK).

1.9 RESEARCH METHODOLOGY

The research is in essence a qualitative legal study with the aim of proving that Malaysia cannot escape the duties imposed by the principles of *non-refoulement* and the best interests of

the child. The main sources of this study are found in international and local literature and materials. The study is entirely library and document-based and depends on primary and secondary resources. Analysis is drawn from data, information and facts gathered from the multiple sources, and legal analysis is conducted based on local and international authorities.

1.10 APPROACH OF RESEARCH

Discussion in this thesis is undertaken in eight chapters and the following approach is adopted in addressing the research questions. After the research overview in Chapter 1, Chapter 2 essentially provides an overview of the international legal setting by looking at the protection and rights of refugee children under the international legal and institutional framework. It also discusses the principle of *non-refoulement* and the best interests of the child, the position of CIL, and the circumstances surrounding customary principles. The deliberation in Chapter 2 provides the basis on which the practice of the Malaysian authorities in the treatment of refugees and the domestic laws are compared and measured in this thesis.

Chapter 3 provides details on the legal status of refugee children under the domestic legal framework. Discussions are based on specific legislation related to children in order to determine the scope of protection provided for refugee children, where relevant. This section also shows how legal protection for refugee children is being neglected, thus leading to their mistreatment.

Chapter 4 then describes the treatment and condition of refugee children in Malaysian territory over the last 40 years or so. This discussion includes the reactions and responses of the authorities when faced with large influxes of refugees in the 1970s and the current forced movement. Highlights of this chapter include the treatment of refugee children in Malaysia, which is in violation of the international standard described in Chapter 2. The combined effect of Chapters 2, 3 and 4 seeks to demonstrate the link between the absence of an express law and the current condition of refugee children. The situation also suggests that it is crucial to find a workable legal solution to improve the protection of refugee children in Malaysia.

Chapter 5 presents arguments on the customary principle affecting refugees: the *non-refoulement* principle with the corroborative element of support for its attainment of customary status. Relevant to this are discussions on Malaysia's membership of international organisations and Malaysia's relationship with *non-refoulement* and the means by which Malaysia might evade the customary rule. Chapter 6 discusses the customary status of the principle of the BIC and its application in refugee situations. Chapters 5 and 6 jointly demonstrate Malaysia's responsibility, if any, for the protection of refugee children under the complementary protection mechanism, founded on CIL.

Chapter 7 incorporates discussions on the application of CIL in Malaysian courts. This chapter investigates whether the Malaysian judiciary has the authority to enforce the CIL and thus compel the authority to fulfil its obligation under the principle of *non-refoulement* and the best interests of the child. The last part, Chapter 8, appraises the issues discussed in the

previous chapters and considers the extent to which this thesis has achieved its objectives and aims. This chapter also recommends a practical approach to law reform in Malaysia.

1.11 RESEARCH LIMITATIONS

This research is interested in finding an alternative way of holding Malaysia responsible for refugee children using customary international law principles. The main agenda is to investigate the status of customary international law as a source of law. It attempts to show whether or not the principles come under the purview of ‘law’ as provided under the Federal Constitution and whether they might be applied in domestic courts. This research focuses on just two principles, the *non-refoulement* rule and the best interests of the child, regardless of any other principle that may also have been said to have attained customary status.

Although the research looks at state responsibility towards refugees under the customary rules, this study does not deal with any legal action that refugee children might take against the authorities in order to enforce their rights or the procedure for doing so, such as the procedure of applying to the court for leave to compel it to exercise its power to perform judicial review of a decision made by an authority. Remedies for the failure of the state to perform its duties in international law are also omitted from the scope of this research. In addition, it does not discuss the application of the BIC on the basis of legitimate expectation.

CHAPTER 2

INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF REFUGEE CHILDREN

2.0 INTRODUCTION

The primary objective of this chapter is to explain the international legal framework for the protection of refugee children including the complementary protection mechanism to show the extent to which they are protected under the international framework focusing on two international treaties: the 1951 Convention Relating to the Status of Refugees and the United Nations Convention on the Rights of the Child. It also examines the position of custom as a source of law in refugee protection. The discussion in this chapter begins with the definition of refugee children and the overview of the international legal setting for the protection of refugee children. The overview first shows that the main principle of the refugee protection regime only benefits refugee children currently seeking refuge in states that are parties to the CRSR, while children who arrive at non- contracting states have limited protection. It then explains complementary protection for refugees under the international human rights law (IHRL). In discussing IHRL, this study undertakes a specific analysis of the UNCRC especially the principle of the best interests of the child (thereafter BIC) and the principle of non- refoulement (thereafter NR) as they provide vital complementary protection for refugee children.

This chapter is also dedicated to a discussion of the role, status and creation of customary international law, as an alternative to making states accountable under the international law, especially when treaties and other written law cannot be applied in a state to protect refugees. It explains the creation of customary international law and its two basic components: state practice; and *opinio juris*, especially regarding a difference of opinion among international law writers on the importance of each element in establishing and proving a rule. This part is the central theme of this chapter as it will show how customary international law operates to fill the gap that exists in situations where ratification of treaties cannot be expected and where a ratified treaty has not become law and lastly, it explains the justification for choosing to pursue Malaysia's obligation under customary international law rather than pushing for the ratification of the CRSR.

2.1 INTERNATIONAL PROTECTION FOR THE REFUGEE POPULATION IN GENERAL.

The primary duty to protect citizens' rights lies with the states, whose responsibility extends to the enacting of laws prohibiting conduct that encroaches upon liberty and human rights, and to the setting up of institutional mechanisms to enforce human rights and penalise violations. In many circumstances, states have failed to discharge this duty or have refused to protect citizens. Meanwhile, the evolution in international law has made it an obligation for states¹ and the international community through the United Nations to protect foreigners and

¹ Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, UK 1984) 8-9, 34-36.

aliens, for example, in the case of refugees, wherever the person is outside the country of nationality or habitual residence.

International protection for the refugee population in general is intertwined with the International Refugee Law (IRL), which provides the principal protection regime, and the International Human Rights Law (IHRL), International Humanitarian Law (IHL),² and Customary International law (CIL), which make up the complementary protection mechanism.³ The laws primarily come from clear and well defined sources, such as treaties, but when custom is claimed as a source of law, its clarity and definitive form is always debated.⁴ Refugee protection includes admission of refugees to the country of asylum, the application and granting of asylum, protection against *refoulement* and the search for durable solutions for refugees.

While refugee law addresses the specific refugee rights under the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), the protection provided under the complementary system deals with extra- Convention protection. The United Nations High Commissioner for Refugees (UNHCR) and the Committee for the Rights of the Child, whose functions includes

² Each branch of law is made up of treaties, customary international law, general principles of law, judicial decisions and opinions of highly respected academics, and these shall be applied by the International Court of Justice in deciding any dispute. See Article 38 of the Statute of the International Court of Justice

³ Complementary protection refers to the protection mechanism outside the 1951 Convention that may close the gap in refugee protection when relying on the Convention alone. It is important to widen the scope of international protection.

⁴ This can be seen from numerous commentaries addressing the issues, as discussed in part 2.4 of this chapter.

monitoring and supervising the implementation of treaties under the respective branches of law, are also relevant elements of the refugee protection framework. ‘Soft law’ instruments such as non-binding regional agreements, guidelines, handbooks and manuals published by international bodies such as the UNHCR constitute an important component of international law.⁵ Non-binding agreements, for instance, are a reflection of political commitments of states⁶ and play a crucial role in influencing refugee protection.⁷ Particularly essential ‘soft laws’ relating to refugees and refugee children in Malaysia are the Conclusions of UNHCR Executive Committee (ExCom),⁸ Concluding Observations and General Comments of the Committee of Rights of the Child,⁹ and the Bangkok Principles, a non-binding regional instrument relating to refugees and human rights adopted by the Asian African Legal Consultative Organisation (AALCO).

⁵ Malcolm N. Shaw, *International Law* (6th Edition, Cambridge University Press, UK 2008) 117- 118.

⁶ Malcolm N. Shaw, *International Law* (6th Edition, Cambridge University Press, UK 2008) 118.

⁷ See James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, UK 2005) 112- 119. Soft laws refer to instruments that have no legal effect and are made out of negotiation among parties to a treaty/convention; they sometimes include states that are not parties. See, for example, Executive Committee (Excom) Conclusions on the International Protection, the Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol (2001) and the Bangkok Principles, updated in 2001 by the Asian African Legal Consultative Council (AALCO). Also, see Pemmaju Sreenivasa Rao, ‘Role of soft law in the Development of International law: Some Random Notes’ in Wafik Z. Kamil (ed), *Fifty Years of AALCO Commemorative Essays in International Law* (AALCO, New Delhi 2007).

⁸ For example ExCom Conclusions, No. 9 (XXVIII) – 1977- Family Reunion; ExCom Conclusions, No. 22 (XXXII) - 1981 - Protection of Asylum-Seekers in Situations of Large-Scale Influx; ExCom Conclusions, No. 47 (XXXVIII) - 1987 - Refugee Children; ExCom Conclusions, No. 59 (XL) - 1989 - Refugee Children; and ExCom Conclusions, No. 84 (XLVIII) – 1997-Refugee Children and Adolescents.

⁹ For instance, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their County of Origin. CRC/GC/2005/6; and General Comment No. 12 (2009) The Right Of The Child To Be Heard Crc/C/Gc/12. 1 July 2009.

2.2 DEFINITION OF REFUGEE CHILDREN, SEPARATED REFUGEE CHILDREN AND UNACCOMPANIED REFUGEE CHILDREN

Defining ‘refugee children’ is not a straightforward process; it requires the semantic understandings of the two words. In this study, a refugee child or a minor will be defined in accordance with the ruling of the UNHCR, which combines the definition of refugee¹⁰ in the CRSR with the meaning of a child in Article 1 of the CRC. Thus, refugee children are persons who are:

‘...below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’¹¹

And who;

‘....owing to a well-founded fear of being persecuted either because of race, religion, nationality, membership of a particular social group, political opinion, are outside the country of nationality or former habitual residence and are unable to or unwilling to

¹⁰ Prior to the adoption of the CRSR, from 1921, ‘refugee’ was given a technical definition according to the specific circumstances and background of each group, such as nationality and country of origin, for the purpose of legal and administration work. See J H Simpson, *The Refugee Problem : Report Of A Survey* (Oxford University Press, London 1939) 3. For instance, see the definition of Russian, Armenian and German refugees in Arrangements with regard to the issue of certificates of identity to Russian refugees of 5 July 1922 (‘1922 Arrangements’) (LNTS, Vol. XIII, No.355); and Arrangements relating to the legal status of Russian and Armenian refugees of 30 June 1928 (‘1928 Arrangements’) (LNTS, Vol. LXXXIX, No.2005). A refugee under these arrangements must meet two conditions: being outside her/his country of origin and enjoying no state protection. See Goodwin-Gill, G S, and McAdam, J, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford, 2007) 16. In 1939 Simpson depicted the characteristics of a refugee as follows: that he must have left his country of residence and taken residence in another country because political events have made it impossible for him to continue residing in his country of origin; or, in the case where he is already absent from his country, he is unwilling to return there because there is a danger to his life and freedom due to the current political conditions in the land. See J H Simpson, *The Refugee Problem: Report Of A Survey* (Oxford University Press, London 1939) 4. The definitions of refugee in earlier documents are deemed flexible and more open as opposed to the closed and legalistic definition in the 1951 Convention. See Goodwin-Gill, G S, and McAdam, J, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford, 2007), J, 3., 19. Article 1A (1) of the CRSR also links the definition of refugees to persons who have been recognised as refugees under previous instruments and agreements: the Arrangements of 12 May 1926 and 30 June 1928; the Conventions of 28 Oct 1933 and 10 Feb 1938; the Protocol of 14 September 1939; and the Constitution of the International Refugee Organisation. These groups are automatically considered refugees under the present 1951 Convention. The initial limitation of the definition of a refugee in the 1951 Convention, which includes only persons who became refugees as a result of events occurring before 1 Jan 1951, was removed by the 1967 Protocol .

¹¹ CRC, Article 1.

avail themselves to the protection of the country of nationality or unable to or unwilling to return to his country of residence’;¹²

As shown here, the vulnerability of refugee children will be seen from two perspectives: as children, and as refugees. As with the definition of refugee, which raises a number of issues, the definition of a child, especially in deciding the maximum age, is a matter for debate.¹³ Within the group of refugee children, two more separate categories can be distinctly identified. The first group comprises children who arrived with their parents or other adults who have the legal responsibility to care for them and they are called accompanied children. Next are unaccompanied children who, at the beginning of the journey were travelling with their parents or other adults who have the legal responsibility to care for them; but were later separated from the parents or the adults or have joined other family members or adults who do not have legal responsibility to care for them; they are called ‘separated children. The other group of unaccompanied children or minors were separated from their parents either at the

¹² CRSR, Article 1 A (2). Meanwhile, Article 1A (1) links the definition of refugees to persons who have been recognised as refugees under previous instruments and agreements: the Arrangement of 12 May 1926 and 30 June 1928; the Conventions of 28 Oct 1933 and 10 Feb 1938; the Protocol of 14 Sept 1939; and the Constitution of the International Refugee Organisation. These groups are automatically considered refugees under the present 1951 Convention. The initial temporal limitation of the definition of a refugee in the 1951 Convention, which includes only persons who became refugees as a result of events occurring before 1 Jan 1951, was removed by the 1967 Protocol. Passage of time has proved that the limitation is no longer practical and that the 1951 Convention is also needed to protect refugees beyond the events prior to 1951.

¹³ There are conflicting views on what constitutes the end of childhood. Hence, states which disagree with the definition of maximum age of a child as set out in the CRC will choose to make a reservation on Article 1. For instance, prior to the adoption of the CRC Malaysia had already set a higher and lower age of majority in various legislations and thus made a reservation to Article 1 of the CRC citing its incompatibility with national laws. The age of criminal liability in the Malaysian Penal Code is set at 10 years old and the minimum age for marriage (in which a person is considered an adult and may enter into a lawful marriage) under Section 8 of the Selangor Islamic Family Law Enactment 2003, is 16 for females and 18 for males. Such diversity, according to Van Bueren, will have an impact on the application and implementation of the CRC. See Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publisher, Dordrecht 1995) 37.

start of or during their flight and thus arrived at the receiving countries unaccompanied by any adult.¹⁴

Such classification of refugee children is an important element in identifying their specific needs and vulnerability to risk; determining special assistance that should be offered to them; and finding the type of durable solution suitable for their condition.¹⁵ As refugee, children are not only more vulnerable than adults to hazardous and stressful condition of refugee life and environment, in fact, they are first to suffer from the effect of forced displacement,¹⁶ and are at risks of not fully developing the mental and physical abilities due to the deprivation of their rights. The hazards normally threatening refugee children include risks to health, including to mental health and psychological condition, and risks of physical, gender and sexual abuse.¹⁷

¹⁴ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997' Para 3.1. At para 3.2: Children accompanied by adults who are not their parents may be treated as unaccompanied children depending on the facts of each case by referring to the UNHCR 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' of 1997, Annex II. The Guidelines provide that the quality and the durability of the relationship between the child and his/her caregiver shall be evaluated to determine whether a child should be treated as accompanied or unaccompanied. If there is any doubt about the truth and nature of the relationship, the child shall be treated as unaccompanied. Minors who have arrived at the first asylum countries without their parents are, *prima facie*, unaccompanied minors and should not be refused entry (Para 4.1) and provided with legal representative (Para 4.2).

¹⁵ Annamaria Enenajor, 'Rethinking Vulnerability: European Asylum Policy Harmonization and Unaccompanied Asylum Seeking Minors' (2008) p. 4. Available at http://www.evasp.eu/attachments/065_Rethinking%20Vulnerability%20European%20Asylum%20Policy%20Harmonization%20and%20UAMs.pdf. Accessed 20 Jan 2009.

¹⁶ Millions have died and become disabled and/or displaced. See Status of the Convention on the Rights of the Child, UNGAOR, 54th Session, Agenda Item 113, U.N. Doc A/ 54/ 265 (1999) 5.

¹⁷ See elaborate discussion on the risks and hazards in Kristina Touzenis, *Unaccompanied Minors Rights and Protection* (XL Edizioni, Roma 2006) 56- 60; Wendy A. Young, 'The Protection of Refugee Women and Children Litmus Test for International Regime Success' (2002) 3 Geo. J. Int'l Aff. 37, 39-40; Carolyn J Seugling, 'Towards a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States' (2004) 37 Vand. J. Transnat'l L. 861, 864-5, 872; and D J Steinbock, 'Separated Children in Mass Migration: Causes and Cures' (2003) 22 St. Louis U. Pub. L. Rev. 297, 299.

Unaccompanied and separated refugee children are more vulnerable to any risk facing refugee children in general¹⁸ and so are female¹⁹ and disabled refugee children.²⁰

2.2 INTERNATIONAL REFUGEE LAW

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, which addresses ‘... *the specific vulnerability of refugees that will not be fully addressed in the general human rights protection*’²¹ provides the fundamental protection in International Refugee Law. Refugee law not only describes who is entitled to protection under international law but also places duties and obligations on contracting states. At some points it also addresses the misconduct of states that leads to cross-border refugee flow and serious mass influxes, which pose a grave threat to international peace and security.²² Although backed by various sources, refugee law alone is unable to provide comprehensive safeguards for refugees,²³ and it essentially relies on international human rights law and its treaties plus the international humanitarian law and international criminal law for complementary protection. This section looks at specific protection provided for refugee children under the CRSR and the role of its supervisory body, the UNHCR to protect the same.

¹⁸ PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*. (Brussels, PICUM: 2008) 6.

¹⁹ Jacqueline Bhabha, ‘Demographic and Rights: Women, Children and Access to Asylum’ (2004) 16 Int’l J. refugee L. 227, 232.

²⁰ Michael Ashley Stein & Janet E. Lord, ‘Enabling Refugee And IDP Law And Policy: Implications Of The U.N. Convention On The Rights Of Persons With Disabilities’ (2011) 28 Ariz. J. Int’l & Comp. L. 401, 404-413.

²¹ James C Hathaway, J. C., *The Rights of Refugees Under International Law* (Cambridge University Press, UK 2005) 75.

²² Guy. S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 5.

²³ Guy. S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 1.

2.2.1 The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

Discussion in this section looks at child specific issues in relation to the CRSR and the *non-refoulement* principle in general. The 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol are intended to safeguard refugees from persecution by requiring contracting states to accept and protect those who fall within its definition.²⁴ For more than fifty years, the CRSR has been “the wall behind which refugees can shelter” even though states have claimed that the CRSR has become out dated, unworkable and irrelevant.²⁵ Provisions that define who are refugees and who are not or have ceased to be refugees²⁶ are used by contracting states to identify and recognise refugees in the refugee status determination process.²⁷ However, some deficiencies in the CRSR have reduced its effectiveness in the protection of refugee and asylum seeking children. As with other treaties, the interpretation of the terms and provisions of the Convention is a primary source of contention, especially the definition of refugee.

The definition of refugee in the Convention and its Protocol has become the basic standard for the treatment of refugees and for establishing the requirements for being considered a refugee

²⁴ 1967 Protocol, Article 1A and 1B and Article 1(2).

²⁵ Erika Feller, ‘Asylum, Migration and Refugee protection: Realities, Myths and the Promise on Things to come’ (2006) 18 IJRL. 509, 514.

²⁶ CRSR, Article 1A to 1F; and 1967 Protocol, Article 1(2).

²⁷ Regardless of their refugee status under the Convention, persons who are at risk of persecution, torture and threat to life and freedom are protected against return or *refoulement*. *This is guaranteed under Art. 33 of the CRSR. In addition*, their illegal entry and presence in the receiving country should not be penalised. Under Art. 31 of the CRSR, the protection is applicable when a refugee comes directly from the territory where they were being persecuted and presents him/herself to the authority without delay and can show lawful reason for such illegal entry and presence..

in other instruments.²⁸ The limit imposed by the CRSR in terms of grounds of persecution exclude those who are not persecuted on account of their race, religion, nationality, membership of particular social group and political opinion from the protection of the Convention. The definition of ‘persecution’ is: ‘the sustained or systematic violation of human rights demonstrative of failure of state protection. A well-founded fear of persecution exists when one reasonably anticipates that the failure to leave the country may result in a form of serious harm which the government cannot or will not prevent.’²⁹ Defining the term, ‘membership of a particular social group’ is rather difficult than the other four grounds, but the contour of the term has expanded.³⁰ A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.³¹ According to Grahl-Madsen, this term functions as a protection against any unforeseen ground of persecution.³² Goodwin-Gill asserts that it is impracticable to provide a comprehensive definition of the term, as it is better to leave it unrestricted and unlimited for it to further develop and benefit diverse groups from persecution.³³ As for children, it is argued that children’s vulnerability may have caused them to be specifically targeted by persecutors

²⁸ See Eduardo Arboleda, ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’ (1991) 3 (2) Int J Refugee Law 185-207; and Elizabeth J. Lentini, ‘The Definition of Refugee in International Law: Proposals For the Future’ (1985) 5 B.C. Third World L.J. 183- 198.

²⁹ See James C Hathaway, ‘Fear of Persecution and the Law of Human Rights’, *Bulletin of Human Rights* 91/1(United Nations, New York, 1992) 99-100.

³⁰ Due to the development contributed by court decisions, scholarly writings and the *UNHCR Handbook on the Procedures and Criteria for Determining the Status of Refugees* 1979 (edited 1992).

³¹ Fullerton, M, ‘A Comparative Look at Refugee Status Based on Persecution Due to Membership in Particular Social Group (1993) 26 *Cornell Int’l. L. J.* 505, 514; and Goodwin-Gill, G S, and McAdam, J, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford, 2007), 76-86.

³² See Atle Grahl-Madsen, *The Status of Refugees in International Law* (Vol. 1, A W Sijthoff, Leiden, 1966), 219.

³³ See Goodwin-Gill, G S, and McAdam, J, *The Refugee in International Law*, 75.

such as the systemic persecution against street children but in practice states do not recognise that children makes particular group.³⁴

2.2.1.1. Child- Specific Persecution

Nevertheless, children's claim of asylum can be more challenging than adults. Children usually rely on the refugee status of the adults, such as their parents or other family members who travel with them.³⁵ If they are unaccompanied, their claim of persecution could be problematic partly because it is difficult for them to prove the well- founded fear and also because the host states perceive the ground as not fulfilling the definition of refugee.³⁶ Unfortunately, the definition of refugee does not include 'age' as a ground of persecution. Age is a unique condition of being characterised as a child and being a child is sometime a ground for which a child is specifically persecuted due to his/her age, lack of maturity or vulnerability.³⁷ It is more problematic when states narrowly define and apply the term 'persecution' and simply rule that certain types of threat, abuse and human rights violation falls outside the definition that consists of only the five listed grounds of persecution.³⁸

³⁴ See Sonja Grover, 'The Systemic Persecution of Street Children as a Crime Against humanity: Implications to Their Rights To Asylum' (2005) 1 Journal of Migration and Refugee Issues 118, 118.

³⁵ Wendy Young, 'Protecting the Rights of Children: Need for U.S. Children's Asylum Guidelines' (1998) http://static.prisonpolicy.org/scans/womenscommission/ins_child.pdf accessed 12 June 2014.

³⁶ Danuta Villarreal, 'To Protect The Defenceless: The Need for Child- Specific Substantive Standards for Unaccompanied Minor Asylum- Seekers' (2004) 26 Hous J Intl L 743, 746.

³⁷ UNHCR, Guidelines on International protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol relating to the Status of Refugees (UNHCR, Geneva 2009) HCR/GIP/09/08, 22 Dec 2009) para 18.

³⁸ In Jacqueline Bhabha, "Seeking Asylum Alone", stated that a number of child-specific persecutions such as abuse and trafficking are not considered 'persecution' under the CRSR. Dalrymple, "Seeking Asylum Alone: Using BIC Principle to Protect Unaccompanied Minors", on pages 134-136 explains state reluctance to recognise child-specific persecution and is of the view that consideration of the best interests rule is the only means of saving children from being returned to harmful situations.

Children, like women, can be persecuted in a particular way and this has been recognised by the UNHCR. The Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees (UNHCR Guidelines on Child Asylum Claims) highlight the importance of putting greater awareness and attentiveness to the unique persecution of children. Recognition of a child- specific persecution also comes from the EU Qualifications Directive (Council Directive 2004/83/EC, 29 April 2004 which requires Member States to consider the element of child- specific persecution in their assessment of a refugee claim of children.³⁹ Article 9.2 of the Directive provides that an act of persecution can take the form of...*(f) acts of gender-specific or child specific nature*. The appalling acts of child specific persecution have urged a number of organisations including the UNHCR, UNICEF, Amnesty International and Human Rights Watch to push for its express legal recognition.⁴⁰ This implies that child specific persecution do exist and requires specific protection under the law.

The substantive analysis of children's well- founded fear of persecution must be conducted based on the understanding that persecution can exist in the form of violation of child-specific rights,⁴¹ child related manifestation of persecution,⁴² and child- specific persecution.⁴³ Denial of specific children's right can lead to other detrimental effects and this

³⁹ The preamble, para 20.

⁴⁰ Scottish Refugee Council, Workshop on Child Specific Persecution (2007)

⁴¹ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees , para. 13, 14.

⁴² Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 15-17.

⁴³ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 18- 36.

is considered a persecution.⁴⁴ Limiting or denying access to education can cause further harm to children since it can lead to other harms such as hampering full development, discrimination, abuse and exploitation. It is also suggested that maltreatment of children on the grounds that children form a particular social group should be a valid basis for claiming persecution.⁴⁵ These forms of persecutions are severe violation of children's right to life, survival and development that must be specially and expressly addressed under the law.

Violations of rights identical to adults but disproportionately affects children than adults are a classified as child- related manifestation of persecution.⁴⁶ A forced marriage or bonded labour for adults may not render similar repercussion as in children. So is when children are totally denied education, the implication is more grave to them than to adults. However, it is difficult for a child to prove that he/she is a prospective victim of child trafficking or forced marriage due to his/ her young age.

Acts of persecution is called child- specific when it cause harms that affect a child solely.⁴⁷

Under-age recruitment, child trafficking and female genital mutilation are child- specific

⁴⁴ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 14.

⁴⁵ See Everett Ressler, Neil Boothby and Daniel J. Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements*. (Oxford University Press, UK 1988) 93.

⁴⁶ UNHCR, Guidelines on International protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol relating to the Status of Refugees, para 15.

⁴⁷ UNHCR, Guidelines on International protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol relating to the Status of Refugees (UNHCR, Geneva 2009) HCR/GIP/09/08, 22 Dec 2009) Para 18; and EU Qualification Directive (Council Directive 2004/83/EC, 29 Apr 2004), Article 9.2

forms of persecution.⁴⁸ Other persecutions that are specific to children include family and domestic violence, forced or underage marriage, bonded or hazardous child labour, forced labour, forced prostitution and child pornography.⁴⁹

Detention Even though Article 31 of the CRSR protects asylum seekers from penalties for illegal entry and presence, such protection is limited to those who came directly from the territory where they are being persecuted, and who presented themselves to the authority without delay. Such a restriction is a huge obstacle for adults as well as children, and it could lead to them serving detention. Detention, no matter how brief, has detrimental effects on children and this is another key issue surrounding refugee children⁵⁰. Arriving in non-contracting states is a far greater challenge, as refugee children will be unable to claim protection under the 1951 Convention. Their protection lies within the international human rights law under the complementary protection mechanism.

The CRSR is also deficient in providing particular protection to children's asylum claim. This study believes that special and unique condition of refugee children requires special approach, procedure and process without which, determination of children's refugee status will not be fair. The Final Act Of The United Nations Conference Of Plenipotentiaries On The Status Of Refugees And Stateless Persons recommends that states take necessary measure to protect

⁴⁸ ExCom, Conclusion on Children at Risk, No. 107,(LVIII) – 2007, para. (g)(viii).

⁴⁹ UNHCR, Guidelines on International protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol relating to the Status of Refugees (UNHCR, Geneva 2009) HCR/GIP/09/08, 22 Dec 2009) para. 18.

⁵⁰ Harriet Samuels, 'Unaccompanied Vietnamese Children in Hong Kong: Child Victims in Refugee- Like Situations (1994) 6 Journal of Child Law 75,80.

family of refugees for the purpose of protecting refugee minors especially those who are unaccompanied and girls.⁵¹ Because of their age and dependency, unaccompanied refugee children seeking asylum are in an extremely vulnerable position and they should be among the first to receive assistance in emergency situation. They are at risk of being mistakenly treated as adults when a proper identity document is not available, and of being required to prove independently their well-founded fear of persecution in a complex procedure.⁵² Unaccompanied refugee children living in camps are at higher risk of exploitation, harassment, and physical and sexual abuse by fellow refugees, the managing authority or soldiers, and even by social and aid workers.⁵³ Without appropriate arrangement for children, they can be subjected to detention since Article 31 of the CRSR only protects asylum seekers from penalties for illegal entry and presence if the asylum seekers came directly from the territory where they are being persecuted, and who presented themselves to the authority without delay. Detention, no matter how brief, has detrimental effects on children.⁵⁴

When children arrive with their parents or older family members, problems can be caused when several applications from family members are consolidated and considered together or

⁵¹ Preamble of the Final Act Of The United Nations Conference Of Plenipotentiaries On The Status Of Refugees And Stateless Persons.

⁵² See UNHCR, 'Guideline for Refugee Children (1988)'; UNHCR, 'Guideline for Protection and Care'; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, Feb 1997'; Fiona Martin and Jennifer Curran, 'Separated Children: A Comparison of the Treatment of Separated Child Refugees Entering Australia and Canada' (2007) 19 (3) IJRL. 440- 470. at p. 440; and Daniel J. Steinbock, 'Separated Children in Mass Migration: Causes and Cures' (2003) 22 St. Louis U. Pub. L. Rev. p. 299

⁵³ UNHCR, UNHCR Remedial Actions And Preventive Measures Against Sexual Exploitation And Abuse Of Refugees <<http://www.unhcr.org/news/NEWS/3db54e985.html>> accessed 10 Feb 2009; UNHCR, Summary Update Of Machel Study Follow-Up Activities In 2001-2002 <<http://www.unhcr.org/protect/PROTECTION/408e04074.pdf>> accessed 11 Feb 2009; and UNGA, Note by the Secretary General: Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa, A/ 57/ 45

⁵⁴ Harriet Samuels, 'Unaccompanied Vietnamese Children in Hong Kong: Child Victims in Refugee- Like Situations (1994) 6 Journal of Child Law 75,80.

concurrently rather than individually.⁵⁵ Here, the child's application is subsumed into the application of the whole family or head of the family in which there will be a risk of overlooking the child's own well-founded fear because insufficient consideration is given to the child's application.

Whether a child is accompanied or unaccompanied is an important factor in the determination of refugee status. This is because an accompanied child may attach his/her claim of refugee status to an adult caregiver.⁵⁶ The attachment will enable the claim of the child to be processed together with the caregiver's claim under the principle of family unity. Nevertheless, the attachment does have its flaws: a child's claim may not be properly investigated in line with his/her age; and the particular vulnerability and needs of the child and his/her best interest may not be properly assessed, and an erroneous decision can lead to devastating consequences.⁵⁷ The same risks are present when a child's claim is attached to the parents' claim.

⁵⁵ Christopher Nugent, 'Whose Children Are These - Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children' (2005-2006) 15 B.U. Pub. Int. L.J. 219; Jacqueline Bhabha & Wendy Young, 'Not Adults in Miniature'; and Jacqueline Bhabha, 'Crossing Borders Alone'.

⁵⁶ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997 Annex II, Para 3 (a) and (b). In cases where a child is accompanied by an adult sibling, their claim can be processed together on the presumption that they have the same history and the adult sibling is aware and able to articulate the child's claim. However, if there is evidence to show that the assumption is invalid or that the adult sibling is unable to articulate the child's claim, the minor shall be treated as unaccompanied for the purpose of refugee status determination. See UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997 Annex II, Para 1 and 2.

⁵⁷ See Jacqueline Bhabha & Nadine Finch, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the UK* (2007); Jacqueline Bhabha & Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines' (1999) 11 Int'l J. Refugee L. 84; Jacqueline Bhabha, 'Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States' (2004) Immigration Policy Centre <http://www.immigrationpolicy.org/sites/default/files/docs/Brief13%20%20Crossing%20Border%20Alone.pdf> > accessed 12 Aug 2009; Jacqueline Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers.' (2001) 3 E.J.M.L. 283- 314; and Harriet Samuels, 'Unaccompanied Vietnamese Children in Hong Kong: Child Victims in Refugee-Like Situations' (1994) 6 Journal of Child Law 75, 77.

2.2.1.2 Child- Specific Refugee Status Determination

One of the major setback of the CRSR relates to the non-differentiation in the requirements of proving ‘well-founded fear of being persecuted’ imposed on applications made by adults and children. In practice, states have interpreted ‘persecution’ to involve subjective and objective elements or, in other words, the requirement to prove a person’s state of mind and the facts in relation to the fear and the persecution.⁵⁸ Hathaway and Hicks however, argue that the CRSR contains no requirement of a subjective element. The applicant should only demonstrate fear from the perspective of expectation of risk. They agree with Grahl-Madsen’s analysis that recognises a person’s claim of well- founded fear of being persecuted regardless of whether he is nervous or feels agitated when thinking about his return to the country where the persecution takes place.⁵⁹ This is argument however, is not what is being practiced.

The same standard or burden of proof used for adults is applicable to children:⁶⁰ they need to prove the objective⁶¹ and subjective⁶² elements of the fear. In this situation, children may be restricted to enjoying the protection of the CRSR due to their limited ability to understand, consider and to communicate the trepidation of persecution. Cognitive ability shortfalls (such as in children) and language problems (where asylum-seekers speak a different language from that of the host country) are the two most prominent barriers to proving this element. It is

⁵⁸ B A Carr, ‘We Don’t Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants’ (2006) 33 PLR 535, 537-8.

⁵⁹ See James C Hathaway and William S Hicks, ‘Is There a Subjective Element in the Refugee Convention’s Requirement of ‘Well Founded Fear’?’ (2005) 26 Michigan Law Journal, 505, 507

⁶⁰ Geraldine Van Bueren, *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995)364.

⁶¹ Bridgette A. Car, ‘We Don’t Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants’ (2006) 33 P.L.R. 535- 573.

⁶² Bridgette A. Car, ‘We Don’t Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants’ (2006) 33 P.L.R. 535, 537

argued that the requirement to prove a subjective element of fear for children should be eliminated so that the decision-maker can concentrate on the child's forward-looking expectation of risk and also reduce the pressure on children having to testify on their fear through interviews. Even where a child is unaware of the risk, the parents attempt to protect that child from persecution for example, from a gender specific persecution such as the 'female genital mutilation' should form a sufficient proof for 'well-founded' fear.⁶³ It is difficult to ascertain the stage at which fear can be classified as 'well-founded', especially when the claimant is an unaccompanied child whose capacity to prove his/her claim may be held back and disrupted for many reasons.⁶⁴ In their attempt to look brave in defying threats and persecution, children may actually endanger their application for refugee status because the element of "fear" is not present. Children's claims can be rejected because of their inability to establish a 'well-founded fear'. Because of language barriers, their tender age and deficiencies in their cognitive ability, proving a well- founded fear is a difficult task for most children.⁶⁵ In instances where the authorities fail to make the best interest and welfare of children their primary consideration, adverse effects on the children are unavoidable.⁶⁶

To fill the gap of refugee determination of children, the UNHCR develop several guidelines

⁶³ B A Carr, 'We Don't Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants' (2006) 33 PLR 535, 571-2.

⁶⁴ See Bridgette A. Carr, 'We Don't Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants' (2006) 33 P.L.R. 535, 552-556.

⁶⁵ Bridgette A. Carr, 'We Don't Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants' (2006) 33 P.L.R. 535, 537.

⁶⁶ Mina Fazel & Alan Stein, 'UK Immigration Law Disregards the Best Interests of Children' (2004) 363 *The Lancet* 1749- 1750; Nicola Rogers, 'Children Refugees—First and Foremost Children' (2003) 4 *Child and Family Law Quarterly* 383- 389; Heaven Crawley and others, 'Working with Children and Young People Subject to Immigration Control: Guideline for Best Practice (Immigration law Practitioners Association, 2004); and Heaven Crawley, 'Child First, Migrant Second: Ensuring That Every Child Matters' ILPA Policy Paper (Immigration law Practitioners Association, 2006)

that help states to deal with this matter. General Comment of the Committee on the Rights of the Child is relevant too. States are advised to refer to soft laws, including the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997 (UNHCR Guidelines on Policies and Procedures);⁶⁷ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees (UNHCR Guidelines on Child Asylum Claims);⁶⁸ and General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (General Comment No.6). Key criteria and measures that should be in place for handling the application by refugee children especially unaccompanied and separated children under these soft laws are briefly discussed below.

First and foremost, due to their vulnerability, children seeking asylum are entitled to special care and protection⁶⁹ based on the principle of BIC.⁷⁰ Refugee determination process/ procedure should not discriminate children in any way as non- discrimination is protected under Article 2 of the UNCRC.⁷¹ It is best to arrange a special procedure with safeguards to protect children's claims.⁷² In the best interests of the child, unaccompanied and separated children should not be detained.⁷³ Especially for unaccompanied and separated children, an independent and qualified guardian should be appointed whereas a legal representative must

⁶⁷ Para 8.6 & 8.7.

⁶⁸ Para. 18-36.

⁶⁹ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para. 7.1..

⁷⁰ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para.1.5.

⁷¹ CRC/GC/2005/6, para. 18.

⁷² Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 65.

⁷³ CRC/GC/2005/6, para. 61; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para. 7.6.

be provided to children who are the principal applicants in asylum procedures.⁷⁴

The assessment of well- founded fear of persecution must be viewed from a child's perspective⁷⁵ and particular attention must be made to persecution of child- specific right, child- specific forms of persecution and child related manifestation of persecution.⁷⁶ A provision and arrangement must be made to ensure children are able to express their views in a child appropriate asylum procedure.⁷⁷ An appropriate asylum procedure should be age and gender sensitive,⁷⁸ with appropriate communication methods adopted to suit different children's age⁷⁹ as they would demonstrate their fear in different ways that adults.⁸⁰ The procedure should also include the determination of the best interests of the child⁸¹ by specially trained and qualified professionals.⁸² The assessment of BIC shall involve the assessment of the child's identity, upbringing, ethnic, cultural and linguistic background, specific vulnerabilities and protection needs.⁸³

⁷⁴ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 69; and CRC/GC/2005/6, para. 69; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para. 8.3.

⁷⁵ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 10.

⁷⁶ As discussed above. Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 10-36; and CRC/GC/2005/6, para. 74; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para. 8.7.

⁷⁷ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 70.

⁷⁸ CRC/GC/2005/6, para. 59.

⁷⁹ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 71.

⁸⁰ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para. 8.6.

⁸¹ CRC/GC/2005/6, para. 19.

⁸² CRC/GC/2005/6, para. 20.

⁸³ CRC/GC/2005/6, para. 20.

It is also crucial to ensure that staffs handling status determination for children are trained in procedure and adoption of law that are age and gender sensitive.⁸⁴ Children application for refugee status must be given priority and decided in prompt and just manner⁸⁵ especially the application of unaccompanied and separated children.⁸⁶ As for unaccompanied children, interviews by the authority should take into account the special situation of the children.⁸⁷

Tracing of family members of unaccompanied and separated child applicants should commence as soon as possible except where such tracing could cause danger to the family; or where the family is part of the persecuting actors.⁸⁸ The principle of BIC shall be taken into consideration in assessing solutions for children who are not entitled for international protection.⁸⁹ Decision to return a child to his/ her country of origin should not be contrary to the principle of NR and can only be made after careful consideration of the BIC and only if the return is in the best interest of the child.⁹⁰ Assessment on the durable solution for refugee children shall be based on the principle of BIC⁹¹ including when a child is to be resettled in a third country.⁹²

⁸⁴ CRC/GC/2005/6, para. 75.

⁸⁵ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, p. 2, para. 8.1.

⁸⁶ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 66; CRC/GC/2005/6, para. 70.

⁸⁷ CRC/GC/2005/6, para. 72.

⁸⁸ Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees, para. 68.

⁸⁹ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, para. 9.2.

⁹⁰ CRC/GC/2005/6, para. 84.

⁹¹ UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, p. 3; para. 8.1.

⁹² CRC/GC/2005/6, para. 92.

2.2.1.3 Article 33: *Non- Refoulement* Principle

At the heart of the CRSR lies the protection against return also known as *non- refoulement*, a paramount protection for refugees.⁹³ The rule of *non-refoulement* was applied and followed by states even before the adoption of the CRSR in 1951. Many states acknowledge their duty not to return refugees under the principle of *NR* but they do not necessarily concede the refugees' right to asylum.⁹⁴ Such a concept of protection was first articulated in Article 3 of the 1933 Convention Relating to the International Status of Refugees.⁹⁵ The principle of *NR* contained in Article 33 of the CRSR is one of the codified provisions of *NR* and is also considered the best form of expression apart from the provisions of other human treaties with similar effect. The provision reads as follows:

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Under this principle, states are prohibited from rejecting, returning or removing refugees and asylum-seekers from their jurisdiction were this to expose them to a threat of persecution, or to a real risk of torture, cruel, inhuman or degrading treatment and punishment, or to a threat

⁹³ ExCom Conclusion No. 65 (XLII) General Conclusion on International Protection 1991, para (c).

⁹⁴ B.S. Chimni (Ed.), *International Refugee Law* (Sage Publications, New Delhi 2000) 85

⁹⁵ Goodwin-Gill, G. S., and McAdam, J., *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007)

to life, physical integrity and freedom.⁹⁶ The protection against return under Article 33 covers recognized refugees and those who have not been formally recognized.⁹⁷ The protection applies not specifically to refugees alone but in general; it exists to prohibit the removal, expulsion or extradition of any person to a territory where he/she is liable to face persecution, torture and a threat to life and liberty.⁹⁸

Rejection at borders, including those who travel by sea amount to violation of NR⁹⁹ and so is summary removal and rejection without access to refugee determination procedure that is fair and effective.¹⁰⁰ To protect against refoulement, examination of refugee claims¹⁰¹ and registration of refugees of both gender must be carried out¹⁰² and the names shall remain in the register until there is a final decision on the asylum application.¹⁰³ The principle of NR must be observed and respected at all times¹⁰⁴ including relating to arrangement of extradition or

⁹⁶ The wording of many instruments such as in Article 5 of the UDHR, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), Article 7 of the ICCPR, Article 5 (2) American Convention on Human Rights 1969 (ACHR), and Article 5 African Charter on Human and People's Rights 1981 (Banjul Charter) show common prohibition of torture, cruel, inhuman or degrading treatment and punishment.

⁹⁷ ExCom Conclusion No. 6 (XXVIII) Non –Refoulement 1977, para. (c).

⁹⁸ The provisions on *non-refoulement* in the CAT, ECHR, ICCPR, ACHR, and the Banjul Charter protect everyone from being returned, not just refugees.

⁹⁹ ExCom Conclusion No. 14 (XXX) General Conclusion on International Protection 1979, para. (c).

¹⁰⁰ ExCom Conclusion No. 85 (XLIX) Conclusion on International Protection 1988, para (q); and ExCom Conclusion No. 99 (LV) General Conclusion on International Protection 2004, para (l).

¹⁰¹ ExCom Conclusion No. 108 (LIX) General Conclusion on International Protection 2008.

¹⁰² ExCom Conclusion No. 91 (LII) Conclusion on Registration of Refugees and Asylum Seekers 2001, para. (a); and ExCom Conclusion No. 93 (LIII) Conclusion on Reception of Asylum Seekers in the Context of Individual Asylum Systems 2002, para (v).

¹⁰³ ExCom Conclusion No. 93 (LIII) Conclusion on Reception of Asylum Seekers in the Context of Individual Asylum Systems 2002, para (v).

¹⁰⁴ ExCom Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx 1981, para 1, 2; ExCom Conclusion No. 52 (XXXIX) International Solidarity and Refugee Protection 1988, para 5; ExCom Conclusion No. 77 (XLVI) General Conclusion on International Protection 1995, para. (a); and ExCom Conclusion No. 94 (LIII) Conclusion on the Civilian and Humanitarian Character of Asylum 2002, para (i)

enactment of law on extradition matter.¹⁰⁵ The rule should be applied especially concerning extradition to a country where there is a well- founded fear of persecution.¹⁰⁶ Situation of mass influx does not warrant derogation from the NR rule, refugee must be admitted at least on temporary basis,¹⁰⁷ and without discrimination.¹⁰⁸ Once refugees are admitted to a territory, States should take effort to protect the right of refugees and their safety.¹⁰⁹ Cooperation among states is an important factor to ensure protection against return.¹¹⁰

2.2.2 United Nations High Commissioner for Refugees (UNHCR)

The office of the United Nations High Commissioner for Refugees is part of the refugee protection framework. The office was established by the United Nations General Assembly in 1949¹¹¹ in the aftermath of World War II, and the Statute of the Office of the UNHCR was adopted in 1950.¹¹² UNHCR's core mandate is to provide international protection to refugees,¹¹³ which is the primary duty,¹¹⁴ and this must be carried out on a non-political basis¹¹⁵ to seek permanent solutions¹¹⁶ for the refugee problem. UNHCR is a supervisory body¹¹⁷ and its work as described in its statute should be purely humanitarian and social.¹¹⁸ It

¹⁰⁵ ExCom Conclusion No. 17 (XXXI) Problem of Extradition Affecting Refugees 1980, para (d), (e).

¹⁰⁶ ExCom Conclusion No. 17 (XXXI) Problem of Extradition Affecting Refugees 1980, para (c).

¹⁰⁷ ExCom Conclusion No. 19 (XXXI) Temporary Refuge 1980, para. (a); and ExCom Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx 1981, para 1, 2.

¹⁰⁸ ExCom Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx 1981, para 1, 2.

¹⁰⁹ ExCom Conclusion No. 65 (XLII) General Conclusion on International Protection 1991, para 9(c).

¹¹⁰ ExCom Conclusion No. 52 (XXXIX) International Solidarity and Refugee Protection 1988, para 5.

¹¹¹ General Assembly Resolution 319 (IV) of Dec 1949.

¹¹² Annex to the General Assembly Resolution 428 (V) of 14 Dec 1950.

¹¹³ As defined in Article 6 of the Statute of the Office of the UNHCR which is similar to the definition of refugee in the CRSR..

¹¹⁴ Guy. S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) p. 426.

¹¹⁵ Statute of the Office of the UNHCR, Article 2.

¹¹⁶ Statute of the Office of the UNHCR, Article 1. This is done by assisting the government and private organisations in aiding refugees to return to their country of origin or voluntary repatriation and integration in a new community, either locally or in a third country.

¹¹⁷ Statute of the Office of the UNHCR, Article 8 (a)

is the only body ever established by the UN exclusively to supervise and oversee the implementation of a treaty, i.e. the refugee convention¹¹⁹.

Just like the CRSR, the UNHCR was also originally adopted as a temporary plan. Article 5 of the UNHCR statute provides that the General Assembly should review whether the UNHCR office should continue with its function beyond 31 December 1953. After more than 50 years, the UNHCR has been entrusted with widening the mandate ‘until the problem of refugees is solved’ through resolutions of the UN General Assembly.¹²⁰ The UNHCR is to refugees what UNICEF is to children - it provides protection via determination of refugee status, providing shelter such as camps, and providing material assistance. Its work, however, has been criticised for various reasons that will be discussed in this chapter.

In governing the UNHCR, the Executive Committee of the High Commissioner's Programme (ExCom) was established principally to advise the High Commissioner¹²¹. From the ExCom's meetings and plenary sessions, various documents are produced including reports, summaries and Conclusions, which are used, among other purposes, to guide states in putting the 1951

¹¹⁸ Statute of the Office of the UNHCR, Article 2.

¹¹⁹ Guy. S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 395.

¹²⁰ UNGA, “Office of the United Nations High Commissioner for Refugees”, Resolution 2003, A/RES/58/151

¹²¹ At his/her request, in the exercise of her his functions. Under Resolution XII 1166, 26 Nov 1957, the UNGA has requested the ECOSOC to establish an Executive Committee of the Programme of the UNHCR which ‘*consist of representatives of from twenty to twenty-five States Members of the United Nations or members of any of the specialized agencies, to be elected by the Council on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem*’. Other functions of the ExCom are to review funds, to authorise appeals for funds and approve proposed budgets, and to advise and approve refugee assistance programmes.

Convention and its Protocols into practice. Devoid of any force of law, the Conclusions are essential for providing guidelines of good practice and could constitute evidence of *opinio juris* in order to establish customary rule of refugee protection.¹²²

2.2.2.1. The Role and Functions

Functions of the UNHCR office are enshrined under Article 8 of its statute and its responsibility has further developed through the UNGA and the ECOSOC provisions.¹²³ These include, but are not limited to, the following: promoting the Conclusions of international conventions for the protection of refugees by supervising their application and proposing amendments; promoting through special agreements with governments the execution of measures to improve the situation of refugees and to reduce the number in need of protection; and promoting the admission of refugees to contracting states or to countries of temporary refuge. The office is also responsible for promoting activities relating to the application to national laws and regulations that would benefit refugees. UNGA and ECOSOC may, through their resolutions and policy directives, extend the functional responsibility of UNHCR¹²⁴ but they cannot impose direct obligations on states.

As regards its duty under the 1951 Convention, UNHCR is empowered with a supervisory function¹²⁵ to oversee exclusively the implementation of the Convention and its 1967

¹²² Guy. S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 217. See, for example, the requirement of *opinio juris* in the creation of customary international law.

¹²³ UNGA, “Office of the United Nations High Commissioner for Refugees”, Resolution 1994. A/ RES/ 48/ 116

¹²⁴ Statute of the Office of the UNHCR , Article 3,

¹²⁵ CRSR, Article 35.

Protocol. This was earlier provided under Paragraph 8 of the UNHCR Statute. Its supervisory role is mainly concerned with promoting state compliance with the rules of the 1951 Convention¹²⁶ in order to give effect to its provisions, but no enforcement powers are given. The supervision function involves gathering of information; analysis of the information and enforcement.¹²⁷ Thus, to effectively exercise its supervisory function, the UNHCR is authorised to, among other things, monitor and report on the situation of refugees but not to monitor states. Under Article 35¹²⁸ of the CRSR, states are obliged to provide information on refugees requested by the UNHCR.¹²⁹ The UNHCR also follow up the implementation of the Convention by states, and gain unobstructed access to asylum applicants, asylum-seekers and returnees¹³⁰. This access allows it to intervene on behalf of the refugees and asylum seekers and hold discussion and dialogue with states or government. Such dealings and

¹²⁶ See Niels Blokker and Sam Muller (Eds), *Towards More Effective Supervision by International Organisations: Essays in Honour of Henry G. Schermers* (Vol. 1, Martinus Nijhoff, Dordrecht 1994) 275-280.

¹²⁷ Walter Kalin, 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 613, 627.

¹²⁸ CRSR, Art. 35:

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees,

(b) the implementation of this Convention, and

(c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

¹²⁹ Walter Kalin, 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 613, 619.

¹³⁰ For further detail on UNHCR's role in supervising the application of the Convention, see Volker Turk, 'UNHCR's Supervisory Responsibility', *New Issues in Refugee Research*, Working Paper No. 67, (UNHCR, Switzerland 2002).

communications with states enable the UNHCR to enforce the CRSR and its protocol.¹³¹ The creation of the UNHCR Working Group on Refugee Children in 1986, which was subsequently expanded to include refugee women, is a testimony of its commitment to seriously protect refugee children.

The UNHCR¹³² plays an important role in many refugee crises¹³³ the world over, especially where a large-scale influx occurs in states that are not party to the CRSR or where a state party does not have its own refugee status determination (RSD) mechanism. Hence, its work is relevant in filling the gap left by the state, or where an UNHCR representative is involved in the state's own RSD mechanism, or where a state is incapable of undertaking the screening process on its own due to the abrupt influx of refugees at borders and in camps. As a supervisory body of the CRSR, UNHCR is mainly an instrument functioning to collaborate with states in promoting refugee protection and protecting and assisting refugees during crises. Being the primary agency for refugee protection, the UNHCR is mandated to provide international protection¹³⁴ to refugees on a non-political basis,¹³⁵ and to seek permanent and durable solutions¹³⁶ for refugee problems by assisting government and private organisations

¹³¹ Walter Kalin, 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 613, 627.

¹³³ David A. Martin, 'Refugees and Migration' in Christopher C. Joyner (Ed), *The United Nations and International Law* (Cambridge University Press, Great Britain 1997) 155, 156.

¹³⁴ Annex to UNHCR Statute, Paragraph 1-8.

¹³⁵ Annex to UNHCR Statute, Paragraph 2.

¹³⁶ Annex to UNHCR Statute, Paragraph 1. This is done by assisting the government and private organisations in aiding refugees to return to their country of origin or voluntary repatriation and integration/resettlement in a new community, either locally (in country of first asylum) or in a third country.

approved by the government.¹³⁷ Its role originated from the Statute of the Office of the UNHCR (UNHCR Statute)¹³⁸ and from the 1951 Convention.¹³⁹ Further responsibilities have been assigned by the General Assembly.¹⁴⁰

Basically, it is the responsibility of governments to establish the mechanism to determine refugee status according to their international obligations and domestic legal frameworks. However, in its function as a supervisory body of the CRSR and the mandate to provide international protection, UNHCR also offers advice on government-related matters, including helping to ensure that the determination process is fast, flexible, more open and less strict. In states that are not party to the CRSR, the UNHCR, at the request and/or consent of the government, will carry out the determination and screening process. In such situations, UNHCR will also provide protection and material assistance.

¹³⁷ UNHCR Statute, Article 1:

“ The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”

¹³⁸ Adopted in 1950, before the 1951 Convention

¹³⁹ Article 35 of the CRSR requires contracting states to cooperate with the UNHCR in the exercise of its functions especially relating to the supervision of the application of the provisions of the CRSR.

¹⁴⁰ UNGA Resolution 408 (V), 14 Dec, 1950. Further functional responsibility has been added through the UNGA and the ECOSOC provisions, resolutions and through policy directives. See Statute of the Office of the UNHCR, Article 3 and UNGA, “Office of the United Nations High Commissioner for Refugees”, Resolution 1994. A/ RES/ 48/ 116. The UN General Assembly has from time to time empowered the UNHCR with additional functions other than those provided under the Statute of the Office of the UNHCR 1950, thus expanding its original mandate and role. Also enshrined in Article 8 of UNHCR Statute are the functions of the UNHCR office, and these include but are not limited to promoting the conclusion of international conventions for the protection of refugees by supervising their application and proposing amendments, to promote through special agreements with governments on the execution of measures to improve the situation of refugees and to reduce the number that needs protection and to promote the admission of refugees to contracting states or to country of temporary refuge. The office is also responsible in promoting activities relating to the application to national laws and regulations that would benefit refugees.

The role of the UNHCR is also important in providing protection for refugees who are not ‘political refugees’ as defined in the CRSR or the statute of the UNHCR. It must be highlighted that, when the CRSR was drafted, the ground of persecution during the period is focused on the five grounds as stated and does not address refugees fleeing generalised violence and natural disasters. In recent decades, large numbers of refugees have been escaping civil wars and other forms of violence but this is not dealt with in the CRSR. In such situations, the involvement of the UNHCR is often needed to ensure that refugees who escape for the reasons above are not returned by host states and that protection and assistance is given to them because their country of origin is unable to provide protection or where such protection is not available for any reason beyond the control of the refugees.

2.2.2.2. The Mandate

In discharging its duties under the UNHCR statute, the agency is required to employ a non-political basis attitude and operate on strictly humanitarian and social grounds.¹⁴¹ By abiding by the directive, the UNHCR has been able to concentrate on improving conditions for refugees and avoiding taking sides with any particular parties in any crisis.¹⁴² Nonetheless, it is suggested that the ‘non-political’ disposition is almost impossible to maintain when dealing with today’s sovereign states and highly sensitive issues.¹⁴³ Paragraph 2 of the Annex to the

¹⁴¹ Annex to UNHCR Statute, Paragraph 2., but this is not easily fulfilled as the UNHCR deals with states, their politicians and their relation with other states, which is inevitably highly political. The difficulties are discussed in David Forsythe, ‘UNHCR's Mandate: The Politics Of Being Non-Political’, Research Paper No. 33 In *New Issues In Refugee Research* (UNHCR, Switzerland 2001)

¹⁴² David A. Martin, ‘Refugees and Migration’ in Christopher C. Joyner (Ed), *The United Nations and International Law* (Cambridge University Press, Great Britain 1997) 158.

¹⁴³ David A. Martin, ‘Refugees and Migration’ in Christopher C. Joyner (Ed), *The United Nations and International Law* (Cambridge University Press, Great Britain 1997) 158.

Statute of the Office of the UNHCR provides that the work of UNHCR shall relate, as a rule, to groups and categories of refugees. This is in contrast to Paragraph 6, which provides that the competence of the High Commissioner extends to individual refugees. However, the practices of UHNCR have shown that both groups and individuals are persons of concern to UNHCR. Difficulty also arises when UNHCR's actions of treating groups of displaced persons are taken as a finding that the source state is persecuting the group. To ease the problem, reference to Paragraph 2 of the Statute is replaced by declaring certain situations to be 'of concern to the international community', thus authorising the UNHCR to use his 'good office' in providing assistance and protection to the groups affected by the situations.¹⁴⁴ UNHCR work is extended to displaced persons, apart from mandated refugees,¹⁴⁵ and both are considered as groups within the competence and concern of the UNHCR.

Given that UNHCR is closely involved in many aspects of the lives of refugees, including those living in refugee camps and those who are in non-contracting states, its involvement inevitably extends to providing them with material assistance. It is believed that refugee protection would be more effective and meaningful were the UNHCR able to provide refugees with real physical assistance such as food, clothes and shelter. However, this role is only feasible with contributions from states. Moreover, before it can solicit contributions from donor states and organisations in order to provide material assistance for refugees in need, it

¹⁴⁴ GA Res. 1167 (XII) (Nov 26, 1957), GA Res. 1286 (XIII) (Dec. 5, 1958).

¹⁴⁵ Refugees not technically refugees under the definition of the Convention and the UNHCR statute may fall under its extended protection spectrum.

has to acquire the permission of the UN General Assembly.¹⁴⁶ Its protection role is often mixed up with that of providing ‘assistance’.

Apart from protecting refugees, the UNHCR is also mandated to protect internally displaced persons (IDP). In short, UNHCR is mandated to offer assistance to refugees, asylum seekers, returnees, non-refugee stateless persons, internally displaced persons and persons threatened with displacement.¹⁴⁷ Due to the breadth and depth of its protection function for IDPs, UNHCR’s core refugee protection functions, as mandated, are said to have been eclipsed by the humanitarian relief work for IDPs.¹⁴⁸ According to Hathaway, its core refugee protection functions, as mandated, have been eclipsed by the humanitarian relief work for internally displaced persons (IDP).¹⁴⁹

After almost 60 years in operation, the UNHCR continues to respond to refugee situations in the midst of unrelenting constraints.¹⁵⁰ In states that are not parties to the refugee convention, the UNHCR plays a fundamental and crucial role in providing a broad spectrum of refugee

¹⁴⁶ David A. Martin, ‘Refugees and Migration’ in Christopher C. Joyner (Ed), *The United Nations and International Law* (Cambridge University Press, Great Britain 1997) 158.

¹⁴⁷ Volker Türk, ‘UNHCR’s Role in Supervising International Protection Standards in the Context of its Mandate’ (International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, May 17–20, 2010) 9

¹⁴⁸ James C. Hathaway, ‘Who Should Watch Over Refugee Law?’ (2002) FMR 14 , 23- 26. UNHCR has been involved in politics through the roles it has taken on and its effort in assisting internally displaced persons have engulfed refugee protection work.

¹⁴⁹ James C. Hathaway, ‘Who Should Watch Over Refugee Law?’ (2002) FMR 14 , 23- 26.

¹⁵⁰ See Jeff Crisp and Damtew Dessalegne, ‘Refugee Protection and Migration Management: Challenge for UNHCR’, New Issues in Refugee Research, Working Paper No. 64, (UNHCR, Switzerland 2002) 2

protection, from the process of determining refugee status to finding durable solutions.¹⁵¹ It also monitors detention of refugees and intervenes where necessary, represents refugees charged in court with offences under the Malaysian Immigration Act 1959/63, and organises outreach activities to refugee communities.¹⁵² With the collaboration of several Non-Governmental Organisations and volunteers, UNHCR provides assistance for refugees in a variety of areas including healthcare, education, financial assistance, shelter, counselling, and other welfare needs.¹⁵³ This is especially important because refugees in Malaysia do not enjoy full access to such services.¹⁵⁴

The UNHCR's role in relation to refugee children is obviously important given that refugee children are invisible in both the Convention and its protocol. This has been partly substituted and remedied by clarification in the UNHCR Handbook and Procedures and Criteria for

¹⁵¹ UNHCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009. Currently, the Malaysian government is taking no part in any processes pertaining to refugees. All are being independently managed by UNHCR Malaysia. See UNHCR, Country Operations Plan for 2007 Malaysia, available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=45221ff62&query=countryoperationsplanmalaysia>

¹⁵² UNHCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009.

¹⁵³ UNHCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009.

¹⁵⁴ UNHCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009. For further detail, see The Malaysian Bar, 'Malaysia's Treatment of Refugees' <http://www.malaysianbar.org.my/press_statements/malaysias_treatment_of_refugees_.html>, accessed 3 Apr 2008; The Malaysian Bar, 'Refugee Go Home- He Would If He Could' <http://www.malaysianbar.org.my/human_rights/refugee_go_home_he_would_if_he_could.html>, accessed 3 Apr 2008; US Committee for Refugees, *The least risky solution: Malaysia's detention and deportation of Acehnese asylum seekers* (US Committee for Refugees, Washington 1998); USCRI, 'USCRI Condemns Malaysia's Arrest And Threat To Forcibly Return Acehnese Asylum Seekers' (Press Release) < <http://www.refugees.org/newsroomsub.aspx?id=1051>>, accessed 3 Apr 2008; Yoges Palaniappan, 'Refugees Live in State of Fear', Myanmar Ethnic Rohingyans Human Rights Organisation Malaysia <http://merhrom.wordpress.com/2007/06/21/refugees-live-in-state-of-fear> > accessed 20 May 2008; Chin Human Rights Organisation, Seeking a Safe haven: Update on the Situation of the Chin in Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 20 May 2008; and Chin Human Rights Organisation, Seeking a Safe haven: Living in Insecurity: Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 20 May 2008

Determining Refugee Status (UNHCR Handbook), which succinctly discusses the position of a minor's application in relation to the principle of family unity¹⁵⁵ and in situations where he/she is unaccompanied.¹⁵⁶

Recognising the vulnerability of refugee children, the UNHCR developed and produced other supplementary guidelines to guide its staff and the operational staff of its partners. These include 'Refugee Children: Guide to Protection and Care',¹⁵⁷ 'UNHCR Guidelines on Determining the Best Interest of the Child',¹⁵⁸ and 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum',¹⁵⁹ which are intended to better protect refugee children. Vital means and measures from these handbooks and guidelines are discussed and demonstrated above at 2.2.1.1; 2.2.1.2 and below in 2.3.2. However, these non-binding documents are still inadequate, as they provide no more than persuasive guidance and advice. Vulnerable individuals such as children need express guarantees of protection that states cannot easily evade and ignore.¹⁶⁰

¹⁵⁵ UNHCR Handbook, Para 181- 188.

¹⁵⁶ UNHCR Handbook. Para 213- 219.

¹⁵⁷ This Guide discusses the application of the child's rights under the UNCRC to refugee children and how refugee children should be treated in accordance with the UNCRC.

¹⁵⁸ This is used to assist the application of the best interest principle in practice, especially in situations where the principle must be made a primary consideration.

¹⁵⁹ This is to be read together with the 1951 Convention and its protocol and the UNCRC.

¹⁶⁰ This is evidenced in state practices that are in breach of the guidelines. See, for instance, Jacqueline Bhabha & Nadine Finch, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the UK* (2007); Jacqueline Bhabha & Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines' (1999); Jacqueline Bhabha, 'Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States' (2004) Immigration Policy Centre <http://www.immigrationpolicy.org/sites/default/files/docs/Brief13%20-%20Crossing%20Border%20Alone.pdf> > accessed 12 Aug 2009; Jacqueline Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers.'; Mina Fazel & Alan Stein, 'UK Immigration law Disregards the Best Interests of Children' (2004); Nicola Rogers, 'Children Refugees—First and Foremost Children' (2003); Heaven Crawley and others, 'Working with Children and Young

2.2.3 UNHCR In Malaysia¹⁶¹

External to the national legal framework is the office of the UNHCR that operates to provide international protection for refugees in Malaysia. The UNHCR has been present in Malaysia since the boat people era in 1970s. As Malaysia is not a party to the refugee convention, UNHCR plays a fundamental and crucial role of providing a broad spectrum of refugee protection, from refugee status determination to finding durable solutions.¹⁶² In fact, in Malaysia UNHCR is considered the main actor in safeguarding and assisting refugees by activities such as reception, registration, documentation, status determination and resettlement of refugees.¹⁶³

By the request of the Malaysian government, UNHCR took the responsibility to register refugees in Malaysia and to determine the individual's refugee status. Those who are recognised as refugees are given identification card/ papers and become persons of concern to UNHCR. The Malaysian authorities have agreed that those who hold the UNHCR identification papers will not be charged with illegal entry or failure to produce valid travel documents but this is not a guarantee against possible detention and abuse by the enforcement

People Subject to Immigration Control: Guideline for Best Practice; and Heaven Crawley, 'Child First, Migrant second: Ensuring That Every Child Matters'.

¹⁶¹ To avoid redundancy, the operation of UNHCR Malaysia is discussed in this Chapter.

¹⁶² UNHCR, 'UNHCR in Malaysia' at <<http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>> and UNHCR, Country Operations Plan for 2007 Malaysia, available at <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=45221ff62&query=countryoperationsplanmalaysia>> accessed on 20 May 2009.

¹⁶³ UNHCR, 'UNHCR in Malaysia' at <<http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>> and UNHCR, Country Operations Plan for 2007 Malaysia, available at <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=45221ff62&query=countryoperationsplanmalaysia>> accessed on 20 May 2009. Currently, the Malaysian government did not take any part in all process pertaining to refugees, all are being independently managed by UNHCR Malaysia.

authorities including the civilians voluntary army.¹⁶⁴ In many reported cases,¹⁶⁵ refusal to acknowledge UNHCR's mandate has caused refugees and asylum seekers with UNHCR papers to be arrested during raids and road-blocks despite showing the identification document to the authorities.¹⁶⁶

Currently there is only one UNHCR office in Malaysia situated in Kuala Lumpur, the capital city after it closed its office in Sabah. Thus, refugees have to approach or get to their office in Kuala Lumpur to apply for refugee status determination. Part of its work requires the UNHCR office to visit and monitor detention centres and intervene where necessary; represent refugees charged in court for offences under the Malaysian Immigration Act 1959/63; and organise outreach activities to refugee communities.¹⁶⁷ With the collaboration of several Non-Governmental Organisations and volunteers, UNHCR provides assistance for refugees in a variety of areas including healthcare, education, financial assistance, shelter, counselling and other welfare needs.¹⁶⁸ This is especially important because refugees in Malaysia do not enjoy full access to such services.¹⁶⁹ As in many other countries where UNHCR has its presence, it

¹⁶⁴ Beginning 2000, the civilian voluntary army (RELA) was authorized to stop and detain illegal immigrants and this was recklessly and blatantly enforced with serious cases of human rights violation. See reports on such incidents in ¹⁶⁴ Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 12.

¹⁶⁵ Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 8.

¹⁶⁶ US Committee for Refugees, *The least risky solution: Malaysia's detention and deportation of Acehnese asylum seekers* (US Committee for Refugees, Washington 1998); and Chin Human Rights Organisation, *Seeking a Safe haven: Living in Insecurity: Malaysia* <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 Jan 2009 p. 4.

¹⁶⁷ UHNCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009.

¹⁶⁸ UHNCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009.

¹⁶⁹ UHNCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009. For further detail, see The Malaysian Bar, 'Malaysia's Treatment of Refugees'

also concentrates its effort to advocacy work and capacity-building for refugees, mobilise resources and organise corporate and public fundraising to finance refugee related work and activities.¹⁷⁰

The UNHCR operation is not without challenges and problem. One of the major issues is the absence of express and real power for the UNHCR to protect refugees. Since there is no specific regime for refugee protection under the Malaysian legal framework, UNHCR is basically operating on the courtesy of the government without legal ground. There is no written agreement that authorise the UNHCR. The authority gives the UNHCR oral permission out of courtesy as a matter of government policy. Without real legal power and cooperation, UNHCR work is less effective as compared to its work in contracting states. It can only offer limited assistance and protection to refugees such as the issuance of refugee identity card; material assistance; and collaboration with NGOs in providing healthcare and education. Furthermore, UNHCR's choice in finding a durable solution for refugees is confined to finding a resettlement place at a third country and to arrange for voluntary repatriation. Local integration is never a choice. Hence, many times the UNHCR is prevented

<http://www.malaysianbar.org.my/press_statements/malaysias_treatment_of_refugees_.html>, accessed 3 Apr 2008; The Malaysian Bar, 'Refugee Go Home- He Would If He Could' <http://www.malaysianbar.org.my/human_rights/refugee_go_home_he_would_if_he_could.html>, accessed 3 Apr 2008; US Committee for Refugees, *The least risky solution: Malaysia's detention and deportation of Acehese asylum seekers* (US Committee for Refugees, Washington 1998); USCRI, 'USCR Condemns Malaysia's Arrest And Threat To Forcibly Return Acehese Asylum Seekers' (Press Release) <<http://www.refugees.org/newsroomsub.aspx?id=1051>>, accessed 3 Apr 2008; Yoges Palaniappan, 'Refugees Live in State of Fear', Myanmar Ethnic Rohingyans Human Rights Organisation Malaysia <http://merhrom.wordpress.com?2007/06/21/refugees-live-in-state-of-fear> > accessed 20 May 2008; Chin Human Rights Organisation, Seeking a Safe haven: Update on the Situation of the Chin in Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 20 May 2008; and Chin Human Rights Organisation, Seeking a Safe haven: Living in Insecurity: Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 20 May 2008.

¹⁷⁰ UHNCR, 'UNHCR in Malaysia' at <http://www.unhcr.org.my/cms/basic-facts/unhcr-in-malaysia>, accessed on 20 May 2009.

from finding a solution which is in the best interests of the refugee children. The other major issue is the government's refusal to be involved in any UNHCR's activities but expects the UNHCR to work on the government's term. For example the authority refuses to accept the ground of persecution as recognised under the CRSR and the mandate of the UNHCR. As a result, it has accused the organisation of blatant recognition of refugees by asserting that asylum seekers without genuine and valid claim are simply accepted as refugees and issued with the UNHCR identity cards.

The third issue relates to limited UNHCR presence, which is only found in Kuala Lumpur. This means refugees must travel to the city to make application. The journey and its expenses may hinder refugees living far from Kuala Lumpur from making the application. Furthermore, they may also refuse to travel in order to avoid the authorities especially members of RELA who are reported to have extorted refugees for money in return for being arrested.¹⁷¹ The fourth issue is more contentious and it relates to the procedure of UNHCR work.¹⁷² It is claimed that the UNHCR practice in determining the refugee status of applicants lacks

¹⁷¹ Chin Human Rights Organisation, Seeking a Safe haven: Update on the Situation of the Chin in Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf > accessed 20 May 2008; and Chin Human Rights Organisation, Seeking a Safe haven: Living in Insecurity: Malaysia <http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf > accessed 20 May 2008.

¹⁷² Reference are made to articles that directly and indirectly comment on the matter. Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 (2) IJRL 251 'Refugee Status Determination Conducted by UNHCR' (1999) 11 (2) IJRL 251 directly discusses the problem in Malaysia. Other works; Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed By UNHCR Refugee Status Determination' (2006) 18 IJRL. 1; The Author, 'Re: Fairness in UNHCR RSD Procedures' (2007) 19 Int'l J. Refugee L. 161; Mark Pallis, 'The Operation of UNHCR's Accountability Mechanism' (2004) 37 N.Y.U.J. Int'l. L. & Pol. 869; and Nicholas Morris, 'Protection Dilemmas and UNHCR's Response: A Personal View From Within UNHCR' (1997) 492 each analyses UNHCR problem in general and in other jurisdiction. This study is of the view that there is high possibility that those setbacks can occur in Malaysia.

transparency¹⁷³ and provides limited opportunity to appeal against a decision.¹⁷⁴ Reasons for rejection of application are not revealed¹⁷⁵ and appeal against a decision is made to the same avenue of first application.¹⁷⁶ Despite its limited capacity, and the challenging environment, the UNHCR office in Kuala Lumpur continues to provide refugees in Malaysia with protection and material assistance including the arrangement for primary education and access to healthcare with the partnership of various voluntary bodies.

2.3 INTERNATIONAL HUMAN RIGHTS LAW (IHRL)

The system of international human rights law has taken shape through the United Nations,¹⁷⁷ and its focus is to preserve the dignity and wellbeing of every individual. Reference to the UN Charter and Universal Declaration of Human Rights 1948 in the preamble of the 1951 Convention clearly indicates that the Convention and its Protocol shall not operate in isolation¹⁷⁸ and that the definition of refugee and his/her protection shall develop concurrently with human rights principles.¹⁷⁹ In practice, the principles of IHRL are applied to enhance refugee protection in many areas, such as in setting the minimum standards for children's education and protection of family life. The minimum treatment offered by countries of asylum to refugees must meet basic human rights standards; otherwise, it will be considered non-

¹⁷³ Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 (2) IJRL 251, 286.

¹⁷⁴ Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 (2) IJRL 251, 252. See also a letter of complaint sent to the High Commissioner at TAC, 'UNHCR Complaint', *Treatment Action Campaign* (2008) < <http://www.tac.org.za/community/node/2425> > accessed 18 July 2009. In the case of *Hunt- Matthes v Secretary General* (Case No. UNDT/NBI/2010/054/UNAT/1680, Judgment No. UNDT/2013/085) the United Nations Dispute Tribunal was told of numerous disclosures about UNHCR negative practice made by the Appellant.

¹⁷⁵ Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 (2) IJRL 251, 277.

¹⁷⁶ Michael Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 (2) IJRL 251, 279.

¹⁷⁷ One of the UN's purposes is to promote and encourage respect for human rights and fundamental freedom for all without distinction as to race, sex, language or religion (UN Charter, Article 1 Para 3.)

¹⁷⁸ Alice Edwards, 'Human Rights, refugees and the Right to enjoy asylum' (2005) 17 IJRL 293, 295.

¹⁷⁹ MR von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff, The Hague 2002) 314.

compliance with international law. Applying the 1951 Convention alone without reference to human rights instrument may lead to violation of minimum standards.¹⁸⁰ There is general recognition of the role of IHRL in supporting, reinforcing and supplementing IRL¹⁸¹ specifically in relation to the ‘grey areas’ in refugee protection. Principles of human rights are being used, for instance to supplement the definitions of ‘persecution’, ‘social group’,¹⁸² and ‘asylum’. Frequent reference to IHRL is also made to determine the application and content of the principle of *non-refoulement*¹⁸³ and protection of refugee children. However, questions are raised about the differing standards between IRL and IHRL, particularly in relation to inconsistent provisions and the standard that shall prevail.¹⁸⁴

The Universal Declaration of Human Rights 1948 (UDHR),¹⁸⁵ a landmark declaration in human rights, provides under Article 14 that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’. This proclamation is reaffirmed by the Vienna Declaration of Human Rights and Programme of Action¹⁸⁶ but, strangely, the right is not expressly enunciated in the 1951 Convention. The right is said to be implicit in the Convention. While the right to seek asylum at the very least means the right to apply for asylum, the right to enjoy asylum, on the other hand, conveys the right to benefit from asylum

¹⁸⁰ Alice Edwards, ‘Human Rights, refugees and the Right to enjoy asylum’ (2005) 17 IJRL 293, 293

¹⁸¹ E. Mason, ‘UNHCR, Human Rights and Refugees Collection and Dissemination of Sources’ (1997) Int’l J. Legal Info 35, 40

¹⁸² G S Goodwin- Gill, ‘Editorial: Asylum 2001- A Convention and A Purpose’ (2001) 13 IJRL 1, 1-2, 8

¹⁸³ See Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 87- 164.

¹⁸⁴ Alice Edwards, ‘Human Rights, Refugees and the Right to Enjoy Asylum’ (2005) 17 IJRL 293, 294

¹⁸⁵ The UDHR, a non-binding instrument, defines the phrases ‘human rights’ and ‘fundamental freedoms’ used in the Charter of the United Nations. Article 14 relates directly to refugees.

¹⁸⁶ Vienna Declaration and Programme of Action, UN World Conference on Human Rights, 1993, UN doc. A/CONF. 157/23, 12 July, para 23

once a person is admitted to a territory of a host state, and this consists of admission to a territory, the right to remain in the territory, and protection from expulsion, extradition, prosecution and punishment.¹⁸⁷ Principles of the UDHR were then reflected in two covenants: the International Covenant on Civil and Political Rights 1966 (ICCPR); and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESR). Less than two decades after the UDHR was proclaimed, scholars began to argue that the UDHR forms part of the customary international law.¹⁸⁸

The importance of states' compliance with the human rights standard has been emphasised by the UNHCR Executive Committee (ExCom¹⁸⁹), and now the protection of refugees under human rights treaties has developed. The right to seek asylum is also developed by the principle of *non-refoulement* and non-rejection at the frontier, enshrined within Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT)¹⁹⁰ and Articles 7¹⁹¹ and 13¹⁹² of the International Covenant on Civil and Political Rights 1966 (ICCPR). Prohibition of return where a person would be in danger of being subjected to torture under Article 3 of CAT and prohibition of torture or cruel, inhuman or degrading treatment and punishment under Article 7 of the ICCPR give rise to the issue of standards; is a refugee 'likely to be subjected to torture'; or is there 'a probability of

¹⁸⁷ Tom Clark, 'Human Rights and Expulsion: Giving Content to the Concept of Asylum' (1992) 4 IJRL 189- 204

¹⁸⁸ See discussion in Lillich, R. B., 'The Growing Importance of Customary International Human Rights Law' (1996) 25 Ga. Journal of International & Comparative Law, 1-30.

¹⁸⁹ See ExCom Conclusion No. 82 (XLVIII) on 'Safeguarding Asylum', 1997, para. (d) (vi)

¹⁹⁰ CAT, Article 3: No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

¹⁹¹ ICCPR, Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..

¹⁹² ICCPR., Article 13, lays down the legal procedure for expulsion.

them being subject to torture'; or is there any 'risk of danger'? Commentators are of the view that the standard of protection against *refoulement* in this regard will be at 'any risk'. Hence, when a person's return to any territory¹⁹³ puts him/her at risk of being subjected to torture, his/her return is prohibited¹⁹⁴. The interpretation of "torture" is another important contribution of IHRL. Article 13 (2) of the UDHR and Article 12 (2) of the ICCPR further support the right to seek asylum by recognising the right to leave any country including one's own country.

The principle of non-discrimination and equality in Article 1 of the UDHR has set the basis for not distinguishing between nationals and non-nationals in granting human rights. This is subsequently reflected in Article 2 (1) of the ICCPR and later in Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The protection provided for refugees under universal human rights treaties that are outside the 1951 Convention is known as complementary protection or subsidiary protection. Complementary protection¹⁹⁵ refers to the protection mechanism outside the 1951 Convention that may close

¹⁹³ Territories in the prohibition of torture mean any territory, including a third country, and it does not necessarily mean country of origin. The legal status of the place where the person is returned is not material, so long as it is a place where the person will be at risk. See Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 37-39.

¹⁹⁴ Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 37-39.

¹⁹⁵ Dependence on human rights treaties or complementary protection could occur in two situations. The first is when children are not recognised as refugees under the CRSR for any reason but the host state has also ratified other human rights treaties, such as CAT, and thus the protection of (for example) CAT as a complementary protection mechanism can be invoked. The second situation is where a host state ratifies only CAT or ICCPR but not the CRSR, thus providing no other option but to apply the provisions of the instruments to all forced migrant situations. Nonetheless, it must be noted that, in some countries, reliance on international treaties is subject to the enactment of national legislation, which incorporates the treaties. Therefore, in those states, mere ratification of international treaties is not sufficient to give effect to the

the gap in refugee protection when relying on the Convention alone. It is important to widen the scope of international protection. A refugee who corresponds to the technical definition of the 1951 Convention and the 1967 Protocol is protected under the Convention only if he or she is present in a state that has ratified the 1951 Convention and is recognised by the refugee status determination system; others, who have failed to claim refugee status but cannot be repatriated, or are in non-contracting states but appear to have a legitimate need for international protection, may turn to the extended protection offered under human rights treaties and general humanitarian principles.¹⁹⁶ This part is dedicated to explaining the branch of law and significant treaties that provide for the protection of refugees in general and refugee children specifically, apart from the CRSR. Most importantly it will discuss the status and importance of customary international law within the international legal framework and its contribution to refugee protection.

2.3.1 The United Nations Convention on the Rights of the Child

The only instrument that specifically provides for children is the UN Convention on the Rights of the Child 1989 (UNCRC).¹⁹⁷ The limited safeguards and constraints in addressing the particular protection needs for refugee children in the refugee law and other human rights

treaties, causing it to be meaningless. The incorporation or transformation of international treaties into national law is based on the principle of monism and dualism. In monist states such as the United States of America, international treaties ratified by authority will automatically be transformed into municipal law, while in dualist states, such as Malaysia and the United Kingdom, the legislative body needs to pass a specific piece of legislation to adopt the treaty before it can be applied in the country.

¹⁹⁶ See, for instance, Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, UK 2007); Brian Gorlick, 'Human Rights and Refugees: Enhancing Protection Through International Human Rights Law' (2000) 69 *Nordic J. Int'l L.* 117; Richard B. Lillich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25 *Ga. Journal of International & Comparative Law*, 1-30; D Perluss and JF Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 *Virginia J. Int'l L.* 551; and Guy S Goodwin- Gill, '*Non-Refoulement* and the New Asylum Seekers' (1986) 26 *Virginia J. Int'l L.* 897.

¹⁹⁷ The Convention was adopted and opened for signature, accession and ratification by the General Assembly Resolution 44/ 25 of 20th Nov 1989 and came into force the following year. See text of the UNCRC at <<http://www2.ohchr.org/english/law/pdf/UNCRC.pdf>>

treaties in general has made it essential to rely on the provision of the UNCRC for exclusive and extended protection for children seeking refuge, although this will depend on whether the UNCRC has been made part of the domestic law of a particular state.¹⁹⁸ The UNCRC makes protection of children a priority and ensure that an agenda for children will not be lost in other agendas of a nation. This can be achieved by protecting children's wellbeing and development from any risks. This study believes that reliance on the general effort of children protection to fulfil the distinct needs of refugee children may not deliver similar results.¹⁹⁹ That is why the UNCRC is a particularly vital legal tool for refugee children, since the 1951 Refugee Convention is weak in its provisions for and application to children.²⁰⁰ It has been argued by Van Bueren that, by virtue of Article 2²⁰¹ of the UNCRC, a state party to the UNCRC is under an obligation to ensure that all children present in its territory, including refugee children,

¹⁹⁸ As an international treaty that needs to be ratified and constitutionally or legally adopted by state legislatures, the UNCRC takes effect at different paces in different states.

¹⁹⁹ This is also why the office of the Commissioner for Children was set up in many developed countries, to avoid children's agenda being lost in adults' agenda. The Commissioner is seen not only as an exclusive champion to protect children's interests but also as someone to further promote and advocate the rights of children.

²⁰⁰ Several commentators are of the view that the CRSR is too male-dominated and takes no cognisance of the unique needs of refugee children. See B A Carr, 'We Don't Need to See Them Cry: Eliminate the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants' (2006) 33 PLR 535, 571-2; Bridgette A. Carr, 'Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure' (2009) 12 Yale Hum. Rts. & Dev. L. J. 120, 124; and J Bhabha, 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework'. (2008) Innocenti Discussion Paper No. 08/3. UNICEF. The role and the importance of the CRC as a protection tool for refugee has been discussed in McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, London 2007); McAdam, J., 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 Int'l J. Child. Rts. 251- 274.

²⁰¹ UNCRC: Article 2:

"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

shall enjoy the rights provided under the UNCRC without discrimination.²⁰² Children of different groups should be treated equally in such a way that every child may have access to education and healthcare without discrimination. The principle of non- discrimination, often associated with the principle of equality, is a protected norm of international human rights law although its scope and content are still debatable.²⁰³ A person is said to be treated equally when he/she is not being discriminated against and vice versa.²⁰⁴

It must be highlighted that the spectrum of children's rights guaranteed under the UNCRC is comprehensive and the four guiding principles of the UNCRC; non- discrimination (Article 2), the BIC (Article 3), the right to life (Article 6) and the right to participate (Article 12) guarantee the basic elements of child protection including those of aliens. The protection under the UNCRC is considered comprehensive as it also protect the civil rights and freedom,²⁰⁵ family environment and alternative care,²⁰⁶ basic health and welfare,²⁰⁷ education, social and cultural rights,²⁰⁸ and the rights of children with special needs²⁰⁹ Refugee children are correctly classified as children with special needs and the provision of Article 22 is dedicated to directly address their situation. Obligations of state parties derived from the UNCRC may be able to address the specific vulnerability of refugee children, especially those who are unaccompanied and separated from their parents, families or lawful guardians.

²⁰² See Geraldine Van Bueren, *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995)362.

²⁰³ A. F. Bayefsky, "The Principle of Equality and Non-Discrimination in International Law" (1990) 11 Human Rights Law Journal 1- 34, 1.

²⁰⁴ Samantha Besson, "The Principle of Non-Discrimination in the Convention on the Rights of the Child" (2005) 13 Intl. J. Of Children's Rights 433- 461, 434.

²⁰⁵ UNCRC:Arts. 7, 8, 13- 17 and 37(a).

²⁰⁶ UNCRC: Arts. 5, 18 (1) (2), 9- 11, 19- 21, 25, 27 (4) and 39.

²⁰⁷ UNCRC:Arts. 6, 18 (3), 23, 24, 26, 27 (1) (2) and (3).

²⁰⁸ UNCRC: Arts. 28, 29 and 31.

²⁰⁹ UNCRC:Arts. 22, 32- 36, 37 (b) (c) (d), 38, 39 and 40.

Ever since the UNCRC came into force, states have been trying to implement it in one way or another, either by adopting the Convention as a whole to become law or gradually reforming their own law to be in compliance with the provisions of the UNCRC. In some instances, the UNCRC is being used as a tool to check and audit whether certain laws, policies and practices of states do conform to international standards.²¹⁰ Even though the UNCRC contains relevant provisions for refugee children apart from provisions of general application for children,²¹¹ it is impossible for the Refugee Convention or the UNCRC to fully and independently protect refugee children without relying on the other.

The definition of refugee children for instance is a combination of the CRSR and the UNCRC due to the non-existence of a specific legal definition of “refugee children”.²¹² As a subset of the general refugee population, refugee children need to satisfy the requirement in the definition of refugee under the CRSR in order to qualify as refugees; and under the UNCRC to be classified as ‘children’.²¹³ Hence, refugee children are subject to two separate

²¹⁰ It is common practice for national and international organisations to make the UNCRC a benchmark for state practice and legislative reform. See Ann Farrell, ‘Child Protection Policy Perspectives and Reform of Australia Legislation (2004) 13 Child Abuse Review 234-245; Karuna Nundy, Global status of Legislative Reform Related to UNCRC (UNICEF, New York 2004) and

²¹¹ Other human rights treaties such as the ICCPR and the ICESCR contain no specific protection for refugee children. See for instance, a general protection for children in the ICCPR under Article 24 (1), (2), (3) and Article 10 (3) of the ICESCR. It declares that children are entitled to special measures of protection and assistance but makes no mention of refugee children..

²¹² It is suggested that the of refugee children is narrow and should be expanded to include child specific persecution to benefit refugee children. See Evarist Baimu, “Children, International Protection” in Rudiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Vol. II, Oxford University Press, London 2012)138; and Geraldine Van Bueren, *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995) 361.

²¹³ A state party to the UNCRC may set a different age of majority for different legislation. For instance, the age of criminal liability may be set at 14 but the ‘minimum age for marriage’ may be set at 16. As cultures and societies view children’s roles in the community in different ways, the length of the

determinations; as refugee and as children.²¹⁴ In practice, the definition is still problematic since the maximum age of a child or the end of childhood, is debatable and is subject to certain limitations due to a state's discretion to interpret and apply the UNCRC. States may already have set a higher or lower age of majority in their domestic laws before the UNCRC was adopted.²¹⁵ The determination of a maximum age of a child in domestic law and an age-based determination of is particularly important because, in the determination of refugee status, a person's status as a child may make him/her eligible for certain leave to remain in and enjoy other benefits provided by a state that are not available to adults.²¹⁶ The following part discusses important features of the UNCRC that are relevant to refugee children encompassing the principle of the best interests of the child (Article 3); specific protection for refugee children under Article 22; and right to education in Article 28. It also examines the application of the BIC principle in refugee situations.

2.3.2 Best Interests of Child And Its Application for the Protection of Refugee Children

The principle of the BIC is closely connected with cases involving children and has been used as a standard and procedure in making decisions impacting children. Introduced in the

childhood period may also be different, leading to diverse ages of majority across communities. See Geraldine Van Bueren, *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995) 36- 38.

²¹⁴ UNHCR Policy on Refugee Children (1993); UNHCR Guidelines on Protection and Care of Refugee Children (1994); and Geraldine Van Bueren, *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995), 361.

²¹⁵ Geraldine Van Bueren, *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995) 37. Besides that, a number of international treaties have adopted a different approach to age, such as Article 6 (5) of the International Covenant on Civil and Political Rights, which prohibits the use of the death penalty for crimes committed by persons below the age of 18 but never defines the word 'child'. In Malaysia, a child's age is important not only for the purpose of ward admission at hospitals but also in determining whether a person has the capacity to give consent to his/her marriage.

²¹⁶ In the United Kingdom, a child who is unsuccessful in her/his application for refugee status under the CRSR may be awarded compassionate leave to remain until reaching 18 years of age. He or she is also entitled to state care. See, for instance, Jacqueline Bhabha and Nadine Finch, *Seeking Asylum Alone Unaccompanied and Separated Children and Refugee Protection in the UK* (2006) 35, 36.

twentieth century, BIC has become widely used in various common law and civil law jurisdictions in the determination of custody, permission for adoption, sentencing, and the administration of juvenile justice, and immigration adjudication.²¹⁷ It means considering the child before a decision affecting a child's life is made.²¹⁸ The UNHCR Guidelines on Determining the Best Interests of the Child defines the term as the wellbeing of a child.²¹⁹ Other principles, such as the 'tender years' doctrine, were also used.²²⁰ The BIC rule is a modern and fundamental²²¹ concept that has evolved from the doctrine of welfare and wellbeing of the child,²²² into a principle that must be followed by all organs of state and stakeholders even when courts are not involved.²²³ As a significant feature of adjudications involving children, the principle has gained greater prominence since its adoption by the UNCRC, which stipulates the principle in Article 3 in a more extensive form since it impose

²¹⁷ Bridgette A. Carr, "Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure" (2009) 12 Yale Hum. Rts. & Dev. L. J. 120, 124

²¹⁸ Yvonne Dausab, 'The Best Interests of the Child' in Oliver C Ruppel (Ed), *Children's Rights in Namibia* (Macmillan, Namibia 2009) 147.

²¹⁹ UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva 2008) 14. Nevertheless, a conclusive and universal definition of the principle is nowhere to be found, not even in the UNCRC itself. The term is criticised for being vague, ambiguous and open to possible manipulation by the decision-maker. Amanda Barratt and Sandra Burman, "Deciding the Best Interests of the Child: An International Perspective on Custody Decision-Making" (2001) 118 S. African L. J. 556- 573, 557

²²⁰ Lynne Marie Kohm, 'Tracing the Foundations of the BICStandard in American Jurisprudence' (2008) 10 J. L. Fam. Stud. 337, 347; and Lisa M. Fitzgibbon, *Campbell V. Campbell: Requiring Adherence To The Correct Legal Standard In Child Custody Proceedings--The "Best Interest Of The Child"* (1993) 45 Me. L. Rev. 471, 478.

²²¹ Jean Zermatten, "The Best Interests of the Child Literal Analysis, Function and Implementation" (Working Report 2010, International Institute for the Rights of the Child: Switzerland) p. 5, available at <http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf>, accessed 12 Apr 2011; Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function" (2010) 18 Int'l. J. Child. Rts. 483- 499, 488.

²²² Jean Zermatten, "The Best Interests of the Child Literal Analysis, Function and Implementation" (Working Report 2010, International Institute for the Rights of the Child: Switzerland) p. 5, available at <http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf>, accessed 12 Apr 2011; Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function" (2010) 18 Int'l. J. Child. Rts. 483- 499, 488.

²²³ The principle of BIC was the paramount objective of the delegates of various countries who worked together in the drafting process of the UNCRC; in Secretary General Javier Perez de Cueller in his speech in the General Assembly Meeting of Nov 2, 1989. See UNGA A/44/PV.61 (28 Nov 1989) p. 8.

the duty to act in accordance with the principle on all organs of states. Article 3 of the UNCRC provides the following:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

In giving meaning to the BIC, firstly, the rule is regarded as a substantive right so that every child has right to have his/ her best interests assessed and given primary consideration in the decision-making.²²⁴ This is a guarantee that the principle will be applied whenever a decision is to be taken concerning a child or a group of children.²²⁵ A decision-maker has to decide what constitutes the best interests of a specific child and must then hold those best interests as a primary consideration along with other competing interests. In every situation, if a decision is likely to have a greater impact on a child, greater emphasis should be placed on the

²²⁴ General Comment No. 14 (2013), para. 6 (a); Jean Zermatten, “The Best Interests of the Child Literal Analysis, Function and Implementation” (Working Report 2010, International Institute for the Rights of the Child: Switzerland) available at <http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf>, accessed 12 Apr 2011; and Jean Zermatten, ‘The Best Interests of the Child Principles: Literal Analysis and Function’ (2010) 18 Int’l J. Child. Rts 483, 485.

²²⁵ Jean Zermatten, “The Best Interests of the Child Literal Analysis, Function and Implementation” (Working Report 2010, International Institute for the Rights of the Child: Switzerland) available at <http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf>, accessed 12 Apr 2011; and Jean Zermatten, ‘The Best Interests of the Child Principles: Literal Analysis and Function’ (2010) 18 Int’l J. Child. Rts 483, 485.

requirement to make the BIC a primary consideration.²²⁶ Therefore, any proposal to adopt a different approach that contradicts the principle or does not hold the BIC as a primary consideration will require solid and concrete reasoning.²²⁷

Secondly, it is to be used as a fundamental and interpretative legal principle to allow interpretation of legal provisions that serve the BIC effectively.²²⁸ Thirdly, as a rule of procedure, a decision that affect children must make evaluation of its impact on children as part of the decision making process.²²⁹ It is a requirement in which procedures involving determination or action affecting a child must make the BIC a primary consideration, and “...give them substantial weight, and be alert, alive and be sensitive to them.”²³⁰ The ‘best interests’ rule is not about the outcome but about the process of reaching the conclusion or decision. The interests of the child are to be assessed and weighed as part of a process in applying a rule or procedure. This principle however, does not command a decision-maker to decide everything in complete agreement with a child’s best interests.²³¹

²²⁶ See, for instance, the case of *Baker v Canada* (Minister of Citizenship and Immigration) 1999 2 S.C.R. 817 in which the Supreme Court stated that, to ensure procedural fairness in cases involving a parent’s deportation, decision-makers should have regard to the human rights of the appellant’s children as the decision will have a huge impact on the life of the children.

²²⁷ John Tobin, “Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children” (2009) 33 *Melb. U. L. Rev.* 579, 589

²²⁸ General Comment No. 14 (2013), para. 6(b).

²²⁹ General Comment No. 14 (2013), para. 6 (c).

²³⁰ As observed by the Supreme Court of Canada in *Baker v Minister of Citizenship and Immigration*, Canada (1999) 2 SCR 817, 864.

²³¹ John Tobin, “Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children” (2009) 33 *Melb. U. L. Rev.* 579, 588

The expansion of the principle as it appears in Article 3²³² demands its application in every action and decision taken by public and private providers of welfare services and by all organs of states; the judiciary, executive and legislature.²³³ The rule places the duty to ‘consider the child’s best interests’ on the adjudicator, administrator and legislator. This can be done by integrating the general principles of the BIC rule into legislative measures, budgets, judicial and administrative decisions.²³⁴ The provision proposes to ensure that the BIC are not compromised by state actions and decisions that might contradict each other. With its best implementation and application, it will ensure that a child’s best interests are not jeopardised by each agency’s actions and decisions. Under this principle, a decision-maker has a duty to give a child’s interests primary consideration together with other interests when deciding on any child-related issue or taking actions affecting children.²³⁵ In undertakings by adjudicatory bodies external to the courts such as conciliation, mediation and arbitration the rule also applies.²³⁶

²³² Debates on whether the phrase is too open, vague, unclear and indeterminate continue. For instance, in J De Waal & I Currie, *The Bill of Rights Handbook* (Juta & Co, Cape Town 2007) 618; Philip Alston, “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” in Philip Alston (Ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (OUP, Oxford 1994); Abdullah An-Na’im, “Cultural Transformation and Normative Consensus on the Best Interests of the Child” (1994) 8 Int’l J. L. & Fam. 62- 81; Michael Freeman, “The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of the Children” (1997) 11 Int’l J. L. Pol. & Fam 360- 388

²³³ General Comment No. 14 (2013), para. 25; and CRC, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin. CRC/GC/2005/6, para. 25-31

²³⁴ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Italy*, 18 March 2003, CRC/C/15/Add.198, para. 23, 24, available at: <http://www.refworld.org/docid/3f2594d04.html> [accessed 11 May 2013]; UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, para. 37, available at: <http://www.refworld.org/docid/4c32dea52.html>

²³⁵ David B. Thronson, ‘Kids Will Be Kids - Reconsidering Conceptions of Children's Rights Underlying Immigration Law’ (2002) 63 Ohio St. L.J. 979, 989.

²³⁶ General Comment No. 14 (2013), para. 27.

The scope of action and decision of administrative authorities is broad encompassing education, healthcare, immigration and asylum matters.²³⁷ The consideration of the rule is also required when legislative bodies adopt laws, regulations, bilateral and multilateral agreement, treaties, and budget approval.²³⁸ The primacy of the principle has to be explicitly mentioned, adequately defined and reflected in all relevant domestic legislations and policies²³⁹ including laws affecting juvenile justice, immigration, freedom of movement and peaceful assembly.²⁴⁰ Laws that provide for capital punishment and life imprisonment is contrary to the BIC and shall not be imposed on children for crimes committed below the age of 18.²⁴¹

Public or private social welfare organization whose work and decision can affect children and their rights includes institutions related to economic, social, culture, civil rights and freedom, either for- profit or non- profit.²⁴² Action includes all conduct, proposal, services, procedures and even inaction such as neglect or failure to take appropriate action.²⁴³ Thus, the principle has to be applied on all occasions where decisions and actions affecting children are to be

²³⁷ General Comment No. 14 (2013), para. 30.

²³⁸ General Comment No. 14 (2013), para. 31.

²³⁹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/C/15/Add.268, para. 27, 28, available at: <http://www.refworld.org/docid/45377eac0.html> ; UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, para. 22, available at: <http://www.refworld.org/docid/541bef294.html>.

²⁴⁰ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : United Kingdom of Great Britain and Northern Ireland*, 20 October 2008, CRC/C/GBR/CO/4, para. 26, 27, available at: <http://www.refworld.org/docid/4906d1d72.html>

²⁴¹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> para. 3.

²⁴² General Comment No. 14 (2013), para. 26.

²⁴³ General Comment No. 14 (2013), para. 17; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> , para. 28;

taken either directly or indirectly.²⁴⁴ The standard is to ensure greater level of consideration and protection when major impact is expected.²⁴⁵ The protection under this rule extends to all children under the age of 18 within a state's jurisdiction²⁴⁶ involving individuals and groups,²⁴⁷ citizen and non- citizen, regardless of their immigration status²⁴⁸ This has also imposed a requirement on the state to make every possible effort to ensure that all state agencies take coordinated actions and decisions in line with the BIC rule.²⁴⁹ It is acknowledged that the principle of BIC is a flexible and adaptable concept to be defined on individual basis.²⁵⁰ The flexible and adaptable character of the BIC has allowed it to respond to individual situation of a child.²⁵¹ Article 3 also imposes a strong legal obligation on states to exercise its discretionary powers after assessing and giving the BIC a primary

²⁴⁴ General Comment No. 14 (2013), para. 19.

²⁴⁵ General Comment No. 14 (2013), para. 20.

²⁴⁶ General Comment No. 14 (2013), para. 21.

²⁴⁷ General Comment No. 14 (2013), para. 23.

²⁴⁸ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 October 2011, CRC/C/ITA/CO/3-4, available at: <<http://www.refworld.org/docid/4ef1e6d12.html>> para. 69; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 October 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html>, para 25.

²⁴⁹ Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function" (2010) 18 Int'l. J. Child. Rts. 483- 499, 487-488.

²⁵⁰ General Comment No. 14 (2013), para. 32. Before UNCRC, the phrase 'best interests of the child' generally referred to the deliberation undertaken by the courts in deciding what orders might best serve the child. Children's Bureau, 'Determining the Best Interests of the Child' <https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf> 12 Oct 2012. In domestic jurisdictions, states adopt different approaches and definitions of the rule, and this is influenced by states' own normative and cultural norms. As per In Abdullah An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child" (1994) 8 Int'l J. L. & Fam. 62- 81. However, a common feature can be identified: the best interests of the child, at least, should be a primary consideration in decision-making. Goldstein, Freud and Solnit in their work substituted the phrase with "the least detrimental available alternative for safeguarding the child's growth and development" but this will not be discussed further in this study. See Patricia Hansen & Frank Ainsworth, 'The 'Best Interests of the Child' Thesis: Some Thoughts from Australia' (2009) 18 Int J Social Welfare 431-439, 431- 432; 00 Ronald Walton, 'The Best Interests of the Child' (1976) 6 (3) Br. J. Social Wk 307- 313, 307. In the undertaking, the court had to consider a number of factors related to the circumstances of the child: Yvonne Dausab, 'The Best Interests of the Child' in Oliver C Ruppel (Ed), *Children's Rights in Namibia* (Macmillan, Namibia 2009) 147.

²⁵¹ General Comment No. 14 (2013), para. 33, 34.

consideration²⁵² not just mere consideration.²⁵³ At times, the principle shall be given paramount consideration for example in adoption.²⁵⁴

Proposals on utilising the principle of the BIC, the guiding principle of the UNCRC, as the basis for providing international protection or adopted as a framework of protection for children seeking refuge have garnered support from states and currently, the principle of the BIC and the UNCRC constitute part of the complementary protection regime supported by some commentators.²⁵⁵ Such protection can be extended to children escaping persecution other than as prescribed in the CRSR, such as generalised violence²⁵⁶ and child specific persecution.²⁵⁷ It has been argued that children who fail to claim refugee status under the 1951 Convention can alternatively apply for international protection under the UNCRC.²⁵⁸ The importance of the BIC for the protection of refugee children is acknowledged and reflected in

²⁵² General Comment No. 14 (2013), para. 36.

²⁵³ General Comment No. 14 (2013), para. 37.

²⁵⁴ General Comment No. 14 (2013), para. 38.

²⁵⁵ See McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, London 2007); McAdam, J., 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 Int'l J. Child. Rts. 251- 274; and Joyce Koo Dalrymple, 'Seeking Asylum Alone: Using the BIC Principle to Protect Unaccompanied Minors' (2006) 26 B.C. Third World L. J. 131

²⁵⁶ Goodwin-Gill, G. S., and McAdam, J., *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 324.

²⁵⁷ See discussion in 2.2.1.1.

²⁵⁸ Protection under human rights treaties is complementary in nature but a study suggests that it should confer equal protection on the beneficiaries. It is argued that children who are granted international protection under the complementary mechanism, such as under the UNCRC, shall be given the same rights as any other person recognised as a refugee under the 1951 Convention. Simply put, non-Convention refugees should enjoy similar refugee rights offered under the refugee protection regime. See McAdam, J., 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 Int'l J. Child. Rts. 251. However, in contrast, it is also argued that it is not legitimate to widen the scope of protection of international law on the basis that the beneficiaries will otherwise enjoy limited rights or be unable to enjoy the same rights as Convention refugees. It is also argued that the gap in the protection regime cannot be simply filled because that was not the intention of the drafters, who purposely wanted to limit the effect of the refugee convention. See James C. Hathaway, 'Leveraging Asylum' (2010) 45 Texas International Law Journal 503.

the UNHCR Guidelines,²⁵⁹ Conclusions of ExCom,²⁶⁰ and General Comment of the CRC.²⁶¹ These documents are intended to be applied in the treatment of unaccompanied and separated children, and all children seeking refuge who come with their parents, legal guardians or other adults.²⁶² The principle of the best interests rule has been applied widely in the determination of refugee status and durable solutions for refugee children by states²⁶³ and by the UNHCR. The UNHCR even make a commitment to apply the principle of BIC systematically in any actions that might affect children under its concern, including children in general or specific groups or individual children.²⁶⁴ In order to ensure that the principle is preserved, the practice is to include consultation with children so that his views can be heard. The consultation should be carried out through “...participatory assessments..., age appropriate and gender sensitive...”²⁶⁵

²⁵⁹ UNHCR, Guidelines on Protection and Care of Refugee Children (1994); UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997 (UNHCR Guidelines on Policies and Procedures); UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997; and UNHCR Guidelines on the Formal Determinations on the Best Interests of the Child 2008.Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees (UNHCR Guidelines on Child Asylum Claims)

²⁶⁰ No. 47 (XXXVIII) 1987 Refugee Children; No. 84 (XLVIII) 1997 Refugee Children and Adolescents; No. 88 (L) 1999 Protection of the Refugee's Family; No. 98 (LIV) 2003 Protection from Sexual Abuse and Exploitation; No. 103 (LVI) 2005 Provision on International Protection Including Through Complementary Forms of Protection; No. 105 (LVII) 2006 Women and Girls at Risk; and No. 107 (LVIII) 2007 Children at Risk.

²⁶¹ CRC, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin. CRC/GC/2005/6; CRC, General Comment No. 12 (2009) The Right Of The Child To Be Heard. CRC/C/GC/12; and CRC, General Comment No. 14 (2013) On The Right Of The Child To Have His Or Her Best Interests Taken As A Primary Consideration (art. 3, para. 1) CRC/C/GC/14.

²⁶² Rebecca MM Wallace and Kirsty Middleton, ‘Refugee Minors: Realising the Best Interests of the Child’ p. 1

²⁶³ For instance in Finland; Annika Parsons, *The Best Interests of the Child In Asylum And Refugee Procedures In Finland* (Helsinki 2010) 78-104.

²⁶⁴ UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child (UNHCR, 2008) 20.

²⁶⁵ UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child (UNHCR, 2008) 20.

The BIC rule should be applied at all levels of displacement,²⁶⁶ from the arrival in a safe territory to the process of repatriation. A typical refugee cycle involves attempt to cross borders into a safe country; application for refugee status either to the state mechanism or UNHCR office; finding of a durable solution; and execution of a durable solution: repatriation, local integration and resettlement in a third country.²⁶⁷ In all of these stages, the lives and welfare of refugees and asylum-seeking children are affected by the decisions and actions of the authority. During the taking of these decisions or actions, the consideration of the BIC may result in beneficial outcomes for the children, a conclusion that may not be achieved when their best interests are not carefully considered.

The application of the best interests rule in refugee situations will ensure that children are always treated as children first, and that any actions and decisions taken by states will not inhibit their enjoyment of their rights as children and as asylum-seekers or refugees. When the BIC is applied in the framework of refugee protection, the whole system that deals with refugee children will be based on the idea of safeguarding the best interests of the child. In deciding what is in the BIC in refugee situation, the nationality, cultural background, wishes and feelings, vulnerabilities and protection needs of the child must be taken into account.²⁶⁸

²⁶⁶ Suggestion by the Committee on the Rights of the Child, which insists that the principle be respected at every stage of the displacement cycle. See Committee on the Rights of the Child, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', UN Doc CRC/GC/2005/6, para 19.

²⁶⁷ UNHCR, Refugees, HIV and AIDS: UNHCR's Strategic Plan for 2005-2007 (UNHCR, Geneva 2005) 10.

²⁶⁸ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 12- 30.

At entry points and state borders, immigration officers have the duty to consider the BIC when dealing with asylum-seeking children who try to enter a territory even when the attempt takes place at a non-official entry point or when they have no valid or legal travel documentation. Such a failure will cause a child to be denied entry and returned to the last port from which he/she has come, sometimes without examining the specific circumstances of the children. Alternatively, if return is not possible, detention is the usual option.²⁶⁹ The principle of the BIC can save refugee children from detention. Even for children in detention, the application of the BIC will help them gain access to education. In deciding whether a child should be detained, the decision-maker must take into consideration the interests and wellbeing of the child such as his/her welfare, and emotional health, while the state's interests may include social, economic and security factors. This means, apart from considering the interests of the state, it is also compulsory for the authority to ensure that all circumstances surrounding the refugee children's personal condition are examined and given due weight.²⁷⁰ A decision made on the basis of protecting state interests, such as curbing illegal immigration, will result in the detention and deportation of the child regardless of his/her background unless deportation is not possible for other reasons.²⁷¹

²⁶⁹ See, for example, Simon Russell, 'Unaccompanied Refugee Children in the United Kingdom' (1999) 11 Int'l J. Refugee L. 126, 151, describing the plight of refugee children who were detained in the UK.

²⁷⁰ Goodwin-Gill, G. S., and McAdam, J., *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 131.

²⁷¹ Such as without proper or legal travel documentation or when the country of origin or habitual residence cannot be confirmed.

In the second phase, the principle is seen as the essence of the determination of refugee status, i.e. whether a child is in need of international protection;²⁷² and in immigration proceedings involving children.²⁷³ In the application for refugee status in a host state, a child's position as a dependant of a parent or parents whose application has been successful may place him/her in a better situation on the basis that it is in his/her best interests that the family remain united.²⁷⁴ As for unaccompanied and separated children, they might be granted 'exceptional leave to remain' in the host state, even when they do not fulfil the refugee convention condition, on the basis that it is not in their best interests to be returned to their country of origin.²⁷⁵ The protection against discrimination (Article 2); the right to life, survival and development (Article 6), and the right to be heard (Article 12) are closely linked to the BIC rule. It is suggested that the sum total of the norms in the UNCRC should provide the basic meaning of the principle.²⁷⁶ This means that the rights provided under the UNCRC should be

²⁷² See McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, London 2007); McAdam, J., 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 Int'l J. Child. Rts. 251- 274; and Joyce Koo Dalrymple, 'Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors' (2006) 26 B.C. Third World L. J. 131

²⁷³ Kerry Abrams' "Immigration Status and the Best Interests of the Child Standard" (2006) 14 Va. J. Soc. Pol. & L 87- 102 (the author discusses the use of the parent's immigration status by the court in custody determination and is of the view that a parent's immigration status as a non-resident/ citizen should not be taken as a negative factor in deciding the best interests of the child); Qingwen Xu, 'In the Best Interests of Immigrant and Refugee Children: Deliberating in their Unique Circumstances' (2005) 84 (5) Child Welfare 747, 755; and David B. Thronson, 'Kids Will Be Kids - Reconsidering Conceptions of Children's Rights Underlying Immigration Law' (2002) 63 Ohio St. L.J. 979, 989

²⁷⁴ UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR, Geneva 1994); *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273. Also see discussion in Lea Brilmayer, "Family Separation as a Violation of International Law" (2003). Faculty Scholarship Series. Paper 2436 <http://digitalcommons.law.yale.edu/fss_papers/2436> accessed 20 May 2010.

²⁷⁵ See for example discussion in Inna Nazarova, 'Alienating "Human" From "Right": U.S. And UK Non-Compliance With Asylum Obligations Under International Human Rights Law' (2002) 25 Fordham Int'l L.J. 1335, 1396-7; Syd Bolton et al, *Working With Refugee Children Current Issues In Best Practice*, (Second edition, ILPA London 2012) 20, 27, 66 available at <http://www.ilpa.org.uk/data/resources/13326/ilpa_wking_w_refugee_chldr2nd_edition_Jan2012.pdf>

²⁷⁶ Thomas Hammerberg, "The Principle of the Best Interests of the Child - What it Means and What it Demands from Adults" (Commissioner for Human Rights, Council of Europe, 30 May 2008) accessed 28 Apr 2011 gives an example that it is in the best interests of the child to receive education (Article 28,

taken into consideration in deciding a child's best interests, except where the contrary is proven, on a case-by-case basis.²⁷⁷ The consideration of a child's best interests shall also involve their rights recognised nationally or internationally where applicable.²⁷⁸

Generally, determining the best interests of a child is not easy as it involves finding answers to several questions.²⁷⁹ A child's best interests may differ from one situation to another, and a group of children's interests may vary from those of another group depending on their circumstances. No one can determine exactly the best interests of a particular child or group of children.²⁸⁰ Furthermore, apart from the law and regulations, culture and religion will also have some influence on what constitutes the interests of a child.²⁸¹ For instance, a decision on whether to award custody rights to parents or recommend international adoption may depend on different sets of factors. As a standard of international law, the concept is a form of

UNCRC) and it is not in the best interests of the child to be exposed to any form of violence (Article 19, UNCRC)

²⁷⁷ CRC, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin. CRC/GC/2005/6, para. 32.

²⁷⁸ John Tobin, "Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children" (2009) 33 Melb. U. L. Rev. 579, 588

²⁷⁹ In Yvonne Dausab, 'The Best Interests of the Child' in Oliver C Ruppel (Ed), *Children's Rights in Namibia* (Macmillan, Namibia 2009) 147, the questions include the following:
"Which specific interest is at issue? What is the nature of such interest? Is the interest of a long-, medium- or short-term duration? Are the criteria for determining such interest objective or are they based on the child's subjective wishes?"

The rule is also referred to as indeterminate, vague, unrestricted: Canadian Supreme Court in *Gordon v Goertz* (1996) 2 S.C.R. 27. To some commentators the term BIC is capable of being exposed to biased interpretations: Amanda Barratt and Sandra Burman, "Deciding the Best Interests of the Child: An International Perspective on Custody Decision-Making" (2001) 118 S. African L. J. 556, 570-571. Nevertheless, the ambiguity of the principle is less intimidating now that there are guidelines and resources that can be utilised to aid the decision-making process in matters impacting children. For instance the UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva 2008).

²⁸⁰ Jean Zermatten, 'The Best Interests of the Child Principles: Literal Analysis and Function' (2010) 18 Int'l J. Child. Rts 483, 485

²⁸¹ Abdullah An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child" (1994) 8 Int'l J. L. & Fam. 62- 81.

protection beyond the traditional precept and it can further develop as the result of states' practices in implementing and applying the principle in their jurisdictions.²⁸²

A determination of refugee children's best interests involves a complex legal process that requires the consideration and deliberation of multiple interests such as his/her safety, the risk of being trafficked, and even the right to family unification. and this may involve consulting experts, assessing information and documents and considering the desires and wishes of the child, parents or anyone having guardianship rights over the child. In relation to this, it must be noted that numerous factors can interfere with the interests.²⁸³ The duty to apply the BIC rule to certain extent, also requires that the child's views and opinions be sought and given due weight according to his/her age and maturity.²⁸⁴ This requirement shows that the right to be heard and to participate is an important component in making sure that the BIC are effectively and sufficiently considered. This is also reiterated in *ZH (Tanzania)* when the court refers to Article 12 of the UNCRC and stresses that the views of the child are important in order to determine his/her best interests.²⁸⁵

Children of all ages including babies have the right to have their best interests assessed and given primary consideration.²⁸⁶ Other important elements that must be taken into account in

²⁸² Wolf, J. 'The Concept of the "Best Interests" in Terms of the United Nations Convention on the Rights of the Child' in Michael Freeman and P. Veerman (eds) *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 129

²⁸³ *Gordon v Goertz* (1996) 2 S.C.R. 27.

²⁸⁴ CRC, General Comment No. 12, CRC/ C/GC/12, Para 70- 74.

²⁸⁵ [2011] UKSC 4, 17.

²⁸⁶ General Comment No. 14 (2013), para. 44.

the assessment of BIC are the child's identity such as gender, country of origin, religion and culture;²⁸⁷ preservation of family life and relations by preventing separation²⁸⁸ unless it is necessary.²⁸⁹ Child's protection and care including basic material, physical, educational, emotional, affection and safety needs must be taken into account.²⁹⁰ Vulnerabilities of the child such as victims of abuse, disability, belonging to minority group, or being a refugee and asylum seekers are important too²⁹¹ and each vulnerability give rise to different best interests.²⁹² Health condition and the right to health are assessed by considering available treatment and risks,²⁹³ and the right to education involves evaluation of access to quality education.²⁹⁴

Assessment of the BIC must incorporate the right of the child to express his views freely and given due weight,²⁹⁵ even if they are too young or in vulnerable conditions such as migrant children.²⁹⁶ The right to be heard and participate in this context is a safeguard the implementation of the BIC.²⁹⁷ This right can be exercised by a representative responsible to communicate the views of the child precisely to the authority.²⁹⁸ If any of the elements to be assessed are in conflict with each other, they should be weighed against each other with the view to find a solution that is in parallel with the BIC.²⁹⁹ Treating the BIC as a primary consideration demands assessment of interests and determination of the interests but if

²⁸⁷ General Comment No. 14 (2013), para. 55.

²⁸⁸ General Comment No. 14 (2013), para. 60.

²⁸⁹ General Comment No. 14 (2013), para. 65.

²⁹⁰ General Comment No. 14 (2013), para. 71- 74.

²⁹¹ General Comment No. 14 (2013), para. 75.

²⁹² General Comment No. 14 (2013), para. 76.

²⁹³ General Comment No. 14 (2013), para. 77, 78.

²⁹⁴ General Comment No. 14 (2013), para. 79.

²⁹⁵ UNCRC, Article 12 (1); General Comment No. 14 (2013), para. 43; General Comment No. 12 (2009), para 1.

²⁹⁶ General Comment No. 14 (2013), para. 54.

²⁹⁷ General Comment No. 14 (2013), para. 89-91.

²⁹⁸ General Comment No. 14 (2013), para. 90.

²⁹⁹ General Comment No. 14 (2013), para. 81.

conflicts arise with other interests or rights, parties involved should find ways to balance between the interests.³⁰⁰

In the third phase, the finding of a durable solution, the principle may influence the type of durable solution found for refugee children. Even when the cause of displacement is no longer present, the UNHCR may choose not to return a separated child to his/her country of origin when local integration and resettlement in a developed third country will best serve his/her interests.³⁰¹ One of the main concerns regarding refugee children is the durable solution. Of the three main solutions often found for refugee children - voluntary repatriation, local integration, and resettlement in a third country - none might be considered optimal since durable solutions for children should be based on their best interests but, on many occasions, the ideal and best solution cannot be secured due to various factors and obstacles and, thus, children have to accept any solution that is available to them. Prior to reaching a solution, questions arise as to whether a child crossing an international border can be admitted to a host state and stay there temporarily while a solution is being worked out and simultaneously enjoy rights to which he/she is entitled. The principle of the best interests rule continues to be part of the governing principle in implementing durable solutions. For instance, in cases where refugee children are integrated locally or resettled in a safe third country, the principle may help to determine the type of support that they should receive.³⁰²

³⁰⁰ General Comment No. 14 (2013), para. 39.

³⁰¹ Syd Bolton et al, *Working With Refugee Children Current Issues In Best Practice*, (Second edition, ILPA London 2012) 20 available at <http://www.ilpa.org.uk/data/resources/13326/ilpa_wking_w_refugee_chldrn2nd_edition_Jan2012.pdf>

³⁰² Carla L. Reyes, 'Gender, Law, And Detention Policy: Unexpected Effects On The Most Vulnerable Immigrants' (2010) 25 *Wis. J.L. Gender & Soc'y* 301, 311-2.

A close look at a UK case can clarify on how to appreciate the application of the BIC rule in judicial determination of immigration and asylum cases that benefit children who will otherwise be adversely affected. Section 55 of the Borders, Citizenship and Immigration Act 2009 imposed the duty to safeguard and promote the welfare of the child on the Secretary of State in discharging the immigration function. Welfare and well-being is an equivalent term used to express BIC.³⁰³ The case referred to is the case of *ZH (Tanzania) v Secretary of State for the Home Department*³⁰⁴ The appellant, ZH is a Tanzanian citizen who has made three unsuccessful asylum applications since 1995. She had a relationship with a UK citizen and they had two children born in 1998 and 2001 both having UK citizenship. The children live with ZH and maintain regular contact with the father after their separation. When the father was diagnosed with HIV in 2007 ZH made a fresh asylum application to the tribunal but was rejected on the basis that she . The case went for reconsideration but was dismissed on the basis that it would not be unreasonable for the children to live in the UK with their father or in Tanzania with mother if she is to be returned. The case went to the Court of Appeal where the finding of the tribunal that it is reasonable to expect that the children would follow the mother back to Tanzania was upheld. ZH then appealed to the Supreme Court and argued that in the light of the obligations of the UK under the UNCR, the removal order is incompatible with their right to respect for their family and private lives when it is the obligations of the Secretary of State to safeguard the welfare of the child under section 55 of the Borders, Citizenship and Immigration Act 2009. The interference with this right is only permissible in accordance with law and in the interests of national security, public safety, economic

³⁰³ 2011] UKSC 4, para. 29.

³⁰⁴ 2011] UKSC 4

wellbeing of the country, for the protection of health or morals; or rights and freedom of others. It was also argued that insufficient weight is given to the welfare of all children who are British citizens who will be affected by the removal of the mother.

The court needs to consider whether it is proportionate to remove ZH and in doing so referred to the case of *Uner v The Netherlands*.³⁰⁵ In *Uner*, the father was convicted for serious criminal offence resulting in his exclusion from Netherlands for 10 years and his permanent resident status being revoked. He argued that this interfere with his right in Article 8 of the ECHR. While recognising the need to give particular consideration to the BIC, in assessing the proportionality in interfering with the right in Article 8, the court however was of the view that in the light of the applicant's current serious convictions, and multiple previous convictions, it is fair and justified to remove the applicant to maintain public order and safety thus, the interests of the state to maintain immigration control outright the BIC. No reference is made to Article 3 of the UNCRC but the substantive right of the BIC however was applied in a manner consistent with the requirement of the BIC rule in the UNCRC.

The court also refers to *Rodrigues da Silva, Hoogkamer v. The Netherlands*.³⁰⁶ Here, the removal of a mother who failed to get a resident permit was held to be in violation of Article 8 because it is in the best interests of the daughter that the mother remains in the Netherlands. In *Rodrigues* the best interests of the child prevails over the interests in maintaining Dutch

³⁰⁵ (App. No. 46410/99 (2007) 45 Eur. H. R. Rep. 14.

³⁰⁶ (App. No. 50435/99, (2007) 44 Eur. H. R. Rep. 729)

Immigration rules and the mother's bad immigration background did not affect the child's right to enjoy family life. It is acknowledged that the European Court of Human Rights requires the consideration of the best interests of the child as a primary consideration. In the present case, the court found that UK has an obligation under Article 3 of the UNCRC to give the principle of BIC a primary consideration. Two Australian cases, *Wan v. Minister for Immigration & Multi-cultural Affairs*,³⁰⁷ and *Minister for Immigration & Ethnic Affairs v. Teoh*,³⁰⁸ that applied the BIC as primary consideration were referred to in defining the obligation. The court acknowledges that Article 3 of the UNCRC must be observed and further noted that the rule of BIC does not demand decision to be made in conformity with the interests of the child.³⁰⁹ By virtue of Article 12 of the UNCRC, the child views are an important element in the determination of the BIC and should not be neglected.³¹⁰ The court went on to state on how the competing interests should be treated:

*'...in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. **It is a factor, however, that must rank higher than any other.** It is not merely one consideration that weighs in the balance alongside other competing factors. **Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.** It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result. [Emphasis added]*³¹¹

³⁰⁷ [2001] 107 FCR 133

³⁰⁸ [1995] 183 CLR 273

³⁰⁹ Per. Lord Kerr, [2011] UKSC 4, 32.

³¹⁰ [2011] UKSC 4, 34.

³¹¹ [2011] UKSC 4, 20.

In the assessment of the BIC, the court has analysed the level of the child's integration in the UK and the length of their absence in Tanzania; arrangement for the care of the child in Tanzania and the level of the child relationship with the parents and other family members that will be severely affected if they were to move to Tanzania.³¹² It also takes into account the status of the children as British citizen, whose rights exercisable in the UK may not be able to be enjoyed in other country.³¹³ Apart from the BIC, the court also considers the public interests in maintaining immigration control, the appellant's appalling immigration history, the establishment of family life between ZH and her partner despite ZH's precarious immigration status.³¹⁴ The court found that it could not devalue the BIC for the fault of the parent, and the mother should not be removed because in doing so would coerce the children to go with her to Tanzania, a decision that is not justified and disproportionate to the preservation of her right in article 8. Thus, the BIC has dwarf the public interest to maintain a fair and firm border control. This case provides a clear guide on how the immigration and asylum cases should be considered in the light of the BIC rule.³¹⁵

Prior to ZH (Tanzania), the court was of the view that the BIC cannot be given primacy³¹⁶ and before the enforcement of Section 55 of the Borders, Citizenship and Immigration Act 2009, the rights of the child were often demoted.³¹⁷ Due to the general reservation of Article 22 of

³¹² [2011] UKSC 4, 29.

³¹³ [2011] UKSC 4, 31.

³¹⁴ [2011] UKSC 4, 33.

³¹⁵ Rebecca M. M. Wallace & Fraser A. W. Janeczko, 'The Best Interests Of The Child In Immigration And Asylum Process: The Case of ZH (Tanzania) v Secretary of State for the Home Department' (2011) 31 *Child. Legal Rts. J.* 46, 48.

³¹⁶ Ayesha Christie, 'The Best Interests of the Child in the UK Immigration Law' (2013) 22 *Nottingham L. J.* 16, 16.

³¹⁷ Ayesha Christie, 'The Best Interests of the Child in the UK Immigration Law' (2013) 22 *Nottingham L. J.* 16, 39.

the UNCRC, the UK authority can exempt the application any of the UNCRC provisions including the BIC rule in immigration matters.³¹⁸ The reservation was removed in 2008 and thereafter Section 55 was introduced and come into force in November 2009.³¹⁹

It is argued that the best interests approach offers “...most potential in assisting a child asylum seeker and a child of an asylum seeker.”³²⁰ This is because the principle is capable to provide a wider basis for international protection than the CRSR alone, and it can stand on its own as a single tool of protection when CRSR is not ratified or cannot be invoked. Thus, when children are unable to explain their well-founded fear for any reason, or the ground of persecution is not as recognised in the CRSR, children can count on the principle of the BIC for protection. While states generally accept and apply the principle of BIC, there are certain matters in which they choose to limit the application. In some instances conflict will arise when immigration laws and regulations adopted by states contain provisions that could impede full implementation of the principle and defeat the spirit of the best interests of the child³²¹ by making detention a mandatory sentence for violating immigration regulations.³²²

³¹⁸ Ayesha Christie, ‘The Best Interests of the Child in the UK Immigration Law’ (2013) 22 Nottingham L. J. 16, 16.

³¹⁹ Ayesha Christie, ‘The Best Interests of the Child in the UK Immigration Law’ (2013) 22 Nottingham L. J. 16, 16.

³²⁰ L.M. Clements, “The Treatment of Children under the UK Asylum System - Children First and Foremost?” [2006] 5 JCLI available at <<http://webjcli.ncl.ac.uk/2006/issue5/clements5.html>>

³²¹ Rebecca MM Wallace and Kirsty Middleton, ‘Refugee Minors: Realising the Best Interests of the Child’ p. 3

³²² Australia’s Migration Act 1958 made it mandatory to detain non-citizens who are in the country unlawfully until visas are granted or they leave the country. Thus, refugees including refugee children are detained in immigration detention facilities. The Migration Amendment (Detention Arrangements) Act 2005 stated that children should be detained as a matter of last resort. However, refugee children can still be detained in community detention, which allows them to move freely within a community. See Refugee Council Australia, *Mandatory Detention* (Refugee Council Australia, 2012) <http://www.refugeecouncil.org.au/f/as-det.php> accessed 12 June 2012.

2.3.4 Specific Protection for Refugee Children under Article 22

Article 22 of the UNCRC provides as follows:

*‘1. States Parties shall take **appropriate measures** to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive **appropriate protection** and **humanitarian assistance** in the enjoyment of **applicable rights** set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or nongovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.’

The inclusion of an article dealing with refugee and migrant children into the UNCRC was originally proposed by the Women’s International Democratic Federation³²³ and in 1981 the delegation of Denmark submitted a proposal to the working group responsible to consider the draft convention on the rights of the child³²⁴ which received strong support from many members the working group.³²⁵

³²³ UN Centre For Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989) Article 22 (Refugee Children) p. 4.

³²⁴ UN Centre For Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989) Article 22 (Refugee Children) p. 4. It reads: “‘The refugee child, whether unaccompanied or in company with his family, guardian or relatives, needs special protection and assistance. The States Parties to the present Convention undertake to assist the refugee child in every possible way and also undertake to, as soon as possible, investigate whether the child has a family or other close relations, and recognize the right of the refugee child to be reunited with his guardians or relatives. In cases where no close relatives have been found the child shall, if possible, be placed within his own cultural and linguistic group. The BIC shall in every case be the guiding principle.”

³²⁵ UN Centre For Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989) Article 22 (Refugee Children) para 378.

Article 22 accentuates the duty of states to take “appropriate measures” to provide not only ‘appropriate protection’ but also ‘humanitarian assistance’ to those children within its jurisdiction while maintaining the prerogative of state parties to determine the appropriate measures to cooperate with other organisations in carrying out the duty under the said article.³²⁶ The use of the word ‘as they consider appropriate’ indicates more than just consent, it also indicates respect for state sovereignty.³²⁷ The term ‘appropriate measures’, ‘humanitarian assistance’ and the ‘applicable rights’ suggests a wide dimension. Humanitarian assistance, a widely used term refers to relief actions provided in line with the principles of humanity, impartiality and neutrality to prevent and alleviate human suffering.³²⁸

The ultimate aim of Article 22 is to enable refugee and asylum seeking children to enjoy the rights they are entitled to under international and domestic law and asylum application. Registration of refugee children is the first step towards the enjoyment of rights under the CRC and other applicable rights such as family reunification, identification of special assistance needs, and for search of durable solution.³²⁹ The principle of the BIC is the foundation of protection under Article 22 though this is not expressly reflected in the provision.³³⁰ This can be seen in the Concluding Observations of Committee of on the Rights

³²⁶ The UN Centre For Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989) Article 22 (Refugee Children) p. 4.

³²⁷ UN Centre For Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989) Article 22 (Refugee Children) para 388-392.

³²⁸ International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance < <http://www.iihl.org/iihl/Album/GUIDING%20PRINCIPLES.doc>> accessed 2 Jan 2009.

³²⁹ As asserted in ExCom, No. 91 (LII) Conclusion on Registration of Refugees and Asylum Seekers 2001, para. (a).

³³⁰ Suggestion of the delegation of the USA and Australia was to insert the term the best interests in Article 22. See UN Centre For Human Rights, Legislative History of the Convention on the Rights of the Child (1978-1989) Article 22 (Refugee Children) para. 96& 102. Even though it was not included in the final

of the Child when considering the state party reports relating to the application of Article 22.³³¹

The parameter of ‘appropriate measures’; ‘as it consider appropriate, and humanitarian assistance can be clarified by referring to General Comments of the UN Committee on the

text, it is understood that appropriate measures or what is considered appropriate encompass the meaning and wisdom of the principle of the BIC.

³³¹ See for example as echoed in the following:

UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para. 69 (b); Ensure in law and practice that the BIC will always be of paramount consideration in deciding on residence permits for foreigners’;

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Italy*, 18 March 2003, CRC/C/15/Add.198, available at: <http://www.refworld.org/docid/3f2594d04.html> [accessed 11 May 2013] Para. 46 (c) :Adopt, as soon as possible, a harmonized procedure in the BIC to deal with unaccompanied minors throughout the State party; (d): ‘Ensure that assisted repatriation is envisaged when it is in the BIC and that a follow-up is guaranteed for those children’;

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (c): Improve considerably the conditions of children in immigration detention when such detention is considered necessary and in the best interests of the child, and bring them into line with international standards;

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para. 46: 46. The Committee welcomes the incorporation of the principle of the BIC in the new Immigration and Refugee Protection Act (2002) and the efforts being made to address the concerns of children in the immigration process, in cooperation with the Office of the United Nations High Commissioner for Refugees and non-governmental organizations;

UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 Jan 2015] para. (b): Expedite the processing of the asylum claims of unaccompanied children under fair and child-sensitive refugee status determination procedures, ensuring that the BIC are a primary consideration, appoint a guardian and legal representative and trace parents or other close relatives;

UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 11 May 2013] para. 66 (a): Ensure that the BIC are always regarded as a primary consideration in all immigration and asylum processes, and that unaccompanied asylum-seeking children are provided with adequate guardianship and free legal representation; and

UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 21 May 2014] para. 68 (d): Custody pending deportation imposed on children can last up to 18 months, which is a direct contravention of the right of the child to have his or her best interests taken as a primary consideration.

Rights of the Child and the Concluding Observation of state periodic report. ‘Appropriate measures’ includes positive and negative obligations: things that state must do and must refrain from doing.³³² A child applying for refugee status and recognised refugee are both entitled to the special protection,³³³ whether their parents or carer are with them or absence.

2.3.4.1. General Protection

The analysis of Concluding Observations of several countries has helped to identify the appropriate measures for general protection of asylum seeking and refugee children under Article 22. The analysis takes into account the observation made by the UN Committee on the Rights of the Child (CRC) of state practice relating to refugee children and the status of its legislation and legal framework. It also grasps the recommendations made the CRC to the respective state. The measures can be summarised as follows:

- a. Standard of protection of refugee children shall be guided by the CRSR, General Comment No.6,³³⁴ General Comment No. 12 (2009) The Right Of The Child To Be Heard, General Comment No 14 (2013) On The Rights Of The Child To Have His Or Her Best Interests Taken As Primary Consideration, the UNHCR Guidelines on Formal Determination of the BIC and the UNHCR's Guidelines on Protection and Care of Refugee Children.³³⁵

³³² UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6 and Concluding Observations contains measures that states shall take and shall avoid.

³³³ The phrase ‘a child who is seeking refugee status or who is considered a refugee’ is used under Article 22.

³³⁴ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 65 (d).

³³⁵ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 May 2013] para 77 (c).

Other relevant human rights instruments that can enhance the protection should be referred too.³³⁶

b. Incorporation of the principle of BIC in immigration legislation³³⁷ and the application of the BIC as a primary consideration in asylum process.³³⁸

c. Protection under the principle of NR including interception policy and push backs.³³⁹

Massive arrival also entitle to NR protection.³⁴⁰ The NR principle must be respected in making

³³⁶ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (e); UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 66; UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 56; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (g).

³³⁷ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para 46.

³³⁸ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 May 2013] para 77 (b); UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (a).

³³⁹ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para. 63; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 66; UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of China (including Hong Kong and Macau Special Administrative Regions), adopted by the Committee at its sixty-fourth session (16 Sept – 4 Oct 2013)*, 4 Oct 2013, CRC/C/CHN/CO/3-4, available at: <http://www.refworld.org/docid/5263de9d4.html> [accessed 11 May 2014] para 82 (a) (b) (c)..

³⁴⁰ UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 55.

decision relating to former child soldier.³⁴¹ Providing sufficient assessment of former child soldier and children who escaped forced conscription³⁴² and prohibition from creating additional reasons to reject an asylum application³⁴³ are also features of protection of *NR*.

d. Prohibition of detention.³⁴⁴ Detention shall only be used as last resort,³⁴⁵ and for the shortest time.³⁴⁶ There should be no automatic detention³⁴⁷ and all detention of refugee

³⁴¹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 67.

³⁴² UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 68 (c).

³⁴³ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation*, 25 Feb 2014, CRC/C/RUS/CO/4-5, available at: <http://www.refworld.org/docid/52f89e2b4.html> [accessed 11 May 2014] para 61.

³⁴⁴ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para. 63; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para 47; UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 May 2013] para 77; UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 65; UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (b).

³⁴⁵ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 62; UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 69 (d).

³⁴⁶ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 69 (d).

³⁴⁷ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (a); UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para 47.

children must be subjected to time limits and judicial review.³⁴⁸ The assessment of detention by a court or independent tribunal to review the need for detention must be carried out³⁴⁹ and this can avoid prolong detention pending deportation.³⁵⁰ Adoption of law to prohibit detention is also needed.³⁵¹

e. Protection against discrimination.³⁵²

f. Protection against abuse and exploitation³⁵³ and protection against torture and brutality of the authorities.³⁵⁴ There is a need to develop strict rules of behaviour for guards in detention facilities³⁵⁵ and children must be separated from unrelated adults.³⁵⁶

g. Provision for suitable and adequate holding/ reception facilities for children³⁵⁷ and to improve condition of detention facilities.³⁵⁸ Measures should be taken so that the environment

³⁴⁸ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 69 (d).

³⁴⁹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (b).

³⁵⁰ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 68 (d).

³⁵¹ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Luxembourg, adopted by the Committee at its sixty-fourth session (16 Sept–4 Oct 2013)*, 29 Oct 2013, CRC/C/LUX/CO/3-4, available at: <http://www.refworld.org/docid/52822d9e4.html> [accessed 11 May 2014] para 45 (b).

³⁵² UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 34.

³⁵³ UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 56.

³⁵⁴ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 65 (a).

³⁵⁵ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (c).

³⁵⁶ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (d).

of the holding/ reception or detention facilities will not cause harmful consequence on mental and physical health and overall development of children.³⁵⁹ Independent monitoring of detention is a good measure.³⁶⁰

h. Establish legal framework on asylum,³⁶¹ and this requires states to review domestic law in order to prohibited expulsion/ return,³⁶² to reform law and legislation to comply with international standards in dealing with asylum seeking and refugee children,³⁶³ to reform laws

³⁵⁷ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para. 64; UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of China (including Hong Kong and Macau Special Administrative Regions), adopted by the Committee at its sixty-fourth session (16 Sept – 4 Oct 2013)*, 4 Oct 2013, CRC/C/CHN/CO/3-4, available at: <http://www.refworld.org/docid/5263de9d4.html> [accessed 11 May 2014] para 80 (d).

³⁵⁸ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (c); UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (c); UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 65 (b).

³⁵⁹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 62 (b); UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 65 (b).

³⁶⁰ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 62(c).

³⁶¹ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para. 64, 65; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 66.

³⁶² UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 65 (b).

³⁶³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64; UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66.

to separate asylum seeking and refugee children from economic migrants,³⁶⁴ to adopt comprehensive guidelines³⁶⁵ and comprehensive legislation³⁶⁶ pertaining to refugee children. In the determination of disputed age of children, states must adopt a unified age assessment procedure which is multidisciplinary,³⁶⁷ with full respect of child dignity³⁶⁸ and avoid degrading and humiliating practice in age determination.³⁶⁹ Instead scientifically approved method should be used.³⁷⁰ Everyone under 18 years is to be treated as children.³⁷¹ It is necessary to implement policies and programs that protect asylum seeking and refugee

³⁶⁴ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of China (including Hong Kong and Macau Special Administrative Regions)*, adopted by the Committee at its sixty-fourth session (16 Sept – 4 Oct 2013), 4 Oct 2013, CRC/C/CHN/CO/3-4, available at: <http://www.refworld.org/docid/5263de9d4.html> [accessed 11 May 2014] para 80 (a).

³⁶⁵ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 66.

³⁶⁶ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 67; UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 67.

³⁶⁷ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 67.

³⁶⁸ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 69 (b).

³⁶⁹ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 68(b).

³⁷⁰ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 69 (b).

³⁷¹ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of Germany*, 25 Feb 2014, CRC/C/DEU/CO/3-4, available at: <http://www.refworld.org/docid/52f8a2074.html> [accessed 15 Sept 2014] para 68 (a).

children³⁷² including setting up good policies on return of children who are not in need of international protection.³⁷³

i. The establishment of asylum procedure³⁷⁴ which is to be implemented by a specific and permanent national authority/ mechanism. The authority also oversee the refugee and asylum seeking especially unaccompanied and separated children³⁷⁵ The mechanism shall work to be in parallel with the right to individual examination of asylum application³⁷⁶ in a fair and expeditious determination procedure.³⁷⁷

j. Data collection and information storage on refugee and asylum seeking children.

k. Adequate and satisfactory living condition,³⁷⁸ with adequate food and clean water³⁷⁹ and the improvement of living condition if it has not reached the satisfactory level.³⁸⁰

³⁷² UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 67.

³⁷³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para 47 (d).

³⁷⁴ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 65 (a).

³⁷⁵ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 67, UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 May 2013] para 77.

³⁷⁶ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 63, 65.

³⁷⁷ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 May 2013] para 78 (b).

³⁷⁸ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 64.

- l. Ratification³⁸¹ of and accession³⁸² to the CRSR and other international instrument such as International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families³⁸³
- m. The withdrawal of reservation to the UNCRC.³⁸⁴
- n. Accommodate family reunification³⁸⁵ and process the application in expeditious manner³⁸⁶ to allow contact with family.³⁸⁷

³⁷⁹ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (d); UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third and fourth periodic reports of China (including Hong Kong and Macau Special Administrative Regions)*, adopted by the Committee at its sixty-fourth session (16 Sept – 4 Oct 2013), 4 Oct 2013, CRC/C/CHN/CO/3-4, available at: <http://www.refworld.org/docid/5263de9d4.html> [accessed 11 May 2014] para 80 (b).

³⁸⁰ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para 66; UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 56.

³⁸¹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.refworld.org/docid/45377ed00.html> [accessed 11 May 2013] para 66; UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 56.

³⁸² UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (e).

³⁸³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (g).

³⁸⁴ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : United Kingdom of Great Britain and Northern Ireland*, 20 Oct 2008, CRC/C/GBR/CO/4, available at: <http://www.refworld.org/docid/4906d1d72.html> [accessed 11 May 2013] para 8.

³⁸⁵ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 Oct 2005, CRC/C/15/Add.268, available at: <http://www.refworld.org/docid/45377eac0.html> [accessed 11 May 2013] para. 64 (e).

³⁸⁶ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para 47 (f).

³⁸⁷ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 65 (c).

- o. Access to education and healthcare,³⁸⁸ sanitation and recreation.³⁸⁹
- p. The organisation of awareness and education programmes to address the prevalence of violation of human rights in society.³⁹⁰

Apart from the above measures and assistance, article 22 also guarantees the applicability of other rights conferred to refugee and asylum seeking children under any other instruments ratified by a state. States' cooperation with multiple organisations in order to trace a child's parents and family and the family's reunification is required alongside the need to ensure that alternative care is arranged and other rights are protected when no family members can be traced. It must be noted that provisions of Article 22 shall be read and applied simultaneously with other articles of the UNCRC especially Article 3 on the BIC principle and reference shall also be made to other international instruments which granted rights and protection to children either directly or indirectly³⁹¹. One of the most crucial is to read article 22 together with Article 2³⁹² which prohibit state party from discriminating any children in its territory and

³⁸⁸ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 Oct 2003, CRC/C/15/Add.215, available at: <http://www.refworld.org/docid/403a22804.html> [accessed 11 May 2013] para 47 (e); UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Japan*, 20 June 2010, CRC/C/JPN/CO/3, available at: <http://www.refworld.org/docid/4c32dea52.html> [accessed 11 May 2013] para 78 (a); UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 65 (d); UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 46.

³⁸⁹ UN Committee on the Rights of the Child (CRC), *Concluding Observations On The Combined Third And Fourth Periodic Reports Of Indonesia*, 13 June 2014, CRC/C/IDN/CO/3-4, available at: <http://www.refworld.org/docid/541bef294.html> [accessed 20 Nov 2014] para 66 (d).

³⁹⁰ UN Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated fourth and fifth periodic reports of Jordan*, 13 June 2014, CRC/C/JOR/CO/4-5, available at: <http://www.refworld.org/docid/541bf99a4.html> [accessed 11 September 2014] para 34 (b).

³⁹¹ Nicola Rogers, 'Children Refugees—First and Foremost Children' (2003) 4 Child and Family Law Quarterly 383- 389, at p. 384.

³⁹² Article 2 of the UNCRC reads as follows: 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind,

jurisdiction. As such, the general implication of this article would be the entitlement to all rights and protection conferred to other children regardless of their nationality, race and so on.

Furthermore, Article 22 also addresses the application for asylum by children, when they are accompanied or unaccompanied, and further guarantees the applicability of other rights conferred on children under any other instruments ratified by a state. States' cooperation with multiple organisations in order to trace a child's parents and family and the family's reunification is required alongside the need to ensure that alternative care is arranged and other rights are protected when no family members can be traced. This study believes that the implementation of the Article can provide better protection for refugee children but as of now it has no effect on Malaysian legal framework.

2.3.4.2. Protection of Unaccompanied and Separated Asylum Seeking and Refugee Children.

One of the fundamental obligations under Article 22 is towards unaccompanied and separated children. States are required to give special attention to unaccompanied minors whose condition calls for special arrangement as reflected in the UNCRC General Comment No. 6 (2005): Treatment Of Unaccompanied And Separated Children Outside Their Country Of Origin. The objective of General Comment No. 6 is to draw attention to the vulnerability of unaccompanied and separated children and to create standards for their protection, care and

irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

proper treatment.³⁹³ The key principles embedded in General Comment No. 6 are non-discrimination, the BIC,³⁹⁴ right to life, survival and development, the right to participate in matters affecting children, *NR* and confidentiality.³⁹⁵

States obligation in relation to unaccompanied and separated children comprised of enacting national legislation regulating refugee children with provisions pertaining to unaccompanied and separated refugee children; establishing administrative structure to implement the legislation and set up mechanism/ measures to identify unaccompanied and separated minors earliest possible such as at the borders, and prevention of separation; and to support such measures by research, information and data gathering. The ratification of other instruments dealing with unaccompanied and separated children and tracing activities for the purpose of reunification of families, if it is in the best interests of the child, should be carried out.³⁹⁶ To ensure respect for the BIC, a competent guardian should be appointed and a legal representative to be provided,³⁹⁷ and arrangement of alternative care³⁹⁸ with a periodic review

³⁹³ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, para 1. The Committee often recommend state party to carry out its recommendation by referring to the General Comment No. 6. See for instance UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations - Italy*, 31 Oct 2011, CRC/C/ITA/CO/3-4, available at: <http://www.refworld.org/docid/4ef1e6d12.html> [accessed 11 May 2013] para. 65 (d).

³⁹⁴ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 20.

³⁹⁵ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 12- 30.

³⁹⁶ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 13-20.

³⁹⁷ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 20, 30, 34.

³⁹⁸ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 39, 40.

of the child's placement should be made.³⁹⁹ On the basis of BIC, detention of unaccompanied and separated children is prohibited⁴⁰⁰ and if detention is exceptionally necessary, it must be governed by the BIC rule.⁴⁰¹ Reunification with family members is subject to the BIC⁴⁰² and so is durable solution i.e. the return to the country of origin,⁴⁰³ local integration,⁴⁰⁴ adoption,⁴⁰⁵ and resettlement in a third country.⁴⁰⁶ The other feature of protection is the right to education. Unaccompanied and separated children must be granted full access to education without discrimination⁴⁰⁷ at all displacement cycle⁴⁰⁸ and the right must be safeguarded by the guardian.⁴⁰⁹ Access to educational opportunities must be ensured regardless of the care

³⁹⁹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 22, 35.

⁴⁰⁰ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 61.

⁴⁰¹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 63.

⁴⁰² UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 82, 83.

⁴⁰³ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 84.

⁴⁰⁴ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 88.

⁴⁰⁵ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 91.

⁴⁰⁶ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 92, 93.

⁴⁰⁷ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 3.

⁴⁰⁸ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 41-43.

⁴⁰⁹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 33.

arrangement⁴¹⁰ even during detention.⁴¹¹ In short, General Comment No. 6 demands states to develop and practice a holistic approach founded on the principle of BIC and non-discrimination in dealing with unaccompanied and separated children.

2.3.5 Right to Education

The right to education in Article 28 of the UNCR covers refugee children on the basis of non-discrimination and it is considered as a basic right for them⁴¹² This right is closely related to the principle of BIC. State parties to the UNCRC are required to make primary education compulsory and free of charge for everyone; secondary education available and accessible for everyone; and higher education accessible to all on the basis of capacity.⁴¹³ As stated in Article 28 (1), different level of state duty is imposed on different level of education. All children are entitled to get and enjoy free primary or elementary education if the state is a party to the UNCRC. Providing free education means no charge should be imposed to enable children to attend school for primary or elementary education.

⁴¹⁰ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 40.

⁴¹¹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 Sept 2005, CRC/GC/2005/6, Para 63.

⁴¹² Prior to UNCRC, the right to free elementary education is guaranteed under Article 26 of the UDHR while Article 22 of the CRSR asserts the duty of contracting states to accord refugees with the same treatment conferred to nationals in relation to elementary education. The ICESCR also guarantees the right to education to be enjoyed by everyone regardless of nationality status. In the declaration entitled 'A World Fit For Children', the United Nations General Assembly Special Session on Children in 2002 declares in para. 7 (5) .."that all boys and girls shall have access to and complete primary education that is free, compulsory and of good quality..".

⁴¹³ UNCRC, Article 28 (1) :
States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

Meanwhile state has a duty to enact laws or provision that would make primary education compulsory and to avoid rules or practice that would exempt or exclude children from education system. The duty also requires state to provide quality education so that children can achieve the envisioned aim in Article 29. Whereas parents or guardian are supposed to ensure that children attend schools.⁴¹⁴ By providing it for free and making it mandatory, states will be able to compel children of all background to attend schools or other similar arrangement regardless of the situation they are in or even their status of their nationality. Education is an important component of children's development since it helps children to attains the sense of human dignity;⁴¹⁵ to develop to their fullest potential;⁴¹⁶ develop their respect for human rights; respect for parents, own culture, country, and language; and respect for the natural environment.⁴¹⁷ Most importantly, education prepares children to function in life and in the society and to live in harmony with other people.⁴¹⁸

State party is responsible to provide quality education that would help children achieve the aim of education enshrined in Article 29.⁴¹⁹ General Comments of the UNCRC shed some light on the link between the right to education and the principle of BIC. The structure,

⁴¹⁴ Robert Johnson, 'The Child's Right to Education: 'Consensus Minus One'? ' (2010) 18 Int'l J. Child Rts, 185, 189.

⁴¹⁵ The Committee on Economic, Social and Cultural Rights elucidated the aim of education as follows: "Education shall be directed to the human personality's 'sense of dignity', it shall 'enable all persons to participate effectively in a free society'...perhaps the most fundamental is that 'education shall be directed to the full development of the human personality'." See General Comment, No. 13, Committee on Economic, Social and Cultural Rights, E/C.12/1999/10, 8 Dec 1999, para. 4.

⁴¹⁶ UNCRC, Article 29 (1) (a); Van Bueren, G., *The International law on the Rights of the Child* (Martinus Nijjhof Publisher, Dordrecht 1995) p. 232.

⁴¹⁷ UNCRC, Article 29 (1) (b) (c) (e).

⁴¹⁸ UNCRC, Article 29 (1) (d); and General Comment, No. 13, Committee on Economic, Social and Cultural Rights, E/C.12/1999/10, 8 Dec 1999, para. 4.

⁴¹⁹ Committee on the Rights of the Child, General Comment No. 1, Aims of Education, U.N. Doc. CRC/GC/2001/1, para. 3.

design, content, delivery, and administration of education as well as law and policy of education must be made based on the principle of BIC.⁴²⁰ Even the assessment of the BIC must take into account the educational needs of the child.⁴²¹ Specifically, paragraph 79 of General Comment No. 14, is a testament of the importance of education in securing the BIC of children including refugee children:

*“It is in the **best interests of the child** to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge. All decisions on measures and actions concerning a specific child or a group of children must respect the **best interests of the child** or children, with regard to education. In order to promote education, or better quality education, for more children, States parties need to have well-trained teachers and other professionals working in different education- related settings, as well as a child-friendly environment and appropriate teaching and learning methods, taking into consideration that education is not only an investment in the future, but also an opportunity for joyful activities, respect, participation and fulfilment of ambitions. Responding to this requirement and enhancing children’s responsibilities to overcome the limitations of their vulnerability of any kind, will be in their **best interests**.” [Emphasis added]*

Education is seen as a tool to disseminate norms and values needed in ensuring social unity and reinforce the idea of homogeneity among the society for lasting survival.⁴²² For most refugees, education may have been disrupted in their home country and when they were forced to leave their country of origin, education shall continue to be a priority. Education for refugee children is intended to provide them with a sense of normalcy; restore their hope in life by making progress in education; provide assistance for the refugees to overcome

⁴²⁰ UNCRC, General Comment No. 14 (2013) on the Rights of the Child to have His or Her Best interests Taken As A Primary Consideration (art.3, para 1) CRC/C/GC/14, para. 30, 32 & 79; and UNCRC, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin. CRC/GC/2005/6, para 93.

⁴²¹ UNCRC, General Comment No. 14 (2013) on the Rights of the Child to have His or Her Best interests taken as a primary consideration (art.3, para 1) CRC/C/GC/14, para 71, & 84.

⁴²² E. Durkheim. Moral education (The Free Press, Glencoe, 1961) cited in Charles Watters, Refugee Children Towards The Next Horizon (Routledge, London 2008) p. 102.

traumatic experience; and teach them skills for life and relevant knowledge to help them live in peace, with tolerance for differences, and appreciation of the environment.⁴²³

The UNHCR reiterates the right of refugee children to gain full access to education in country of asylum in paragraph 7.12 of the Guideline on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997. It works to protect refugee's right that it requires states to coordinate information between agencies including on education in order to assist the refugee⁴²⁴ and to identify their education background. At the minimum, primary education must include literacy and numeracy.⁴²⁵ If it is not possible to allow refugee children to join the national education system, a separate scheme or special arrangement must be put in place so long it is provided for free. In cases where children need to work, the education should not be interfered.⁴²⁶ Even when refugee children are in detention, education must continue.⁴²⁷

2.4 CUSTOMARY INTERNATIONAL LAW

The other component of complementary protection for refugees is Customary International Law, another important dimension of this research. The complementary protection provided by the rules of customary international law (CIL) offers protection for internationally displaced persons without the need for treaty ratification. Commentators argue that some

⁴²³ M. Sinclair. Education in Emergencies . (2007) p. 52-3. Available at: <http://www.cedol.org/wp-content/uploads/2012/02/52-56-2007.pdf>. [Accessed on 2 May 2013].

⁴²⁴ UNHCR, Guideline on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997. Para. 5.3.

⁴²⁵ UNHCR, Guidelines on Protection and Care of Refugee Children (1994) p. 48.

⁴²⁶ UNHCR, Guidelines on Protection and Care of Refugee Children (1994) p. 36.

⁴²⁷ UNHCR, Guideline on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 1997. Para. 7.8.

principles of international law relating to refugee protection have become CIL, such as the prohibition of torture, which is also a *jus cogens* principle,⁴²⁸ the principle of *non-refoulement* or non-return, and the principle of the best interests of the child. The focus of this thesis is on the *non-refoulement* principle of best interests of the child and this part deals with the general rule in the formation of CIL while specific examination on the customary status of NR rule and BIC principle are dealt with in Chapter 5 and 6 respectively. The International Court of Justice, in *Nicaragua v. USA (merits)*,⁴²⁹ confirms the position of the customary international law as the second most important source of international law after treaties,⁴³⁰ and the same can be said of the source of refugee rights. The ExCom of the UNHCR asserts that CIL is a vital foundation on which to establish the responsibilities and obligations of non-contracting states towards refugees.⁴³¹

Under CIL, states have an obligation to protect those within their jurisdiction and territory even if they are not their citizens or nationals.⁴³² This obligation developed under the reciprocal diplomatic protection practised since the Middle Ages.⁴³³ However, there is no indication of how states should treat their own nationals/citizens under international law unless specified by an international treaty to which the state is a party.⁴³⁴ The granting of asylum to persons who have fled their country of origin can also be traced to an ancient state

⁴²⁸ Erika de Wet, 'The Prohibition of Torture as an international Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15 EJIL 97-121.

⁴²⁹ *ICJ Rep*, 1986, 14, 97.

⁴³⁰ Statute of the International Court of Justice: Article 38 (1b)

⁴³¹ The term 'non-contracting states' refers to states that are not parties to the 1951 Refugee Convention.

⁴³² Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, UK 1984) ; and Hans Kelsen, *Principles of International Law* (New York 1952) 242.

⁴³³ Malcolm N. Shaw, *International Law* (6th Edition, Cambridge University Press, UK 2008) 20.

⁴³⁴ Hans Kelsen., *Principles of International Law* (New York 1952) 242

practice.⁴³⁵ In protecting aliens (non-nationals are usually referred to as aliens), states are required to grant them minimum rights,⁴³⁶ including equality before the law, but not to the extent of giving aliens equal rights as citizens.⁴³⁷ National laws that are inconsistent with the international law on protection of aliens or citizens of foreign states are not valid excuses for evading the responsibilities owed by states to persons who are not citizens. The spheres of international law and national legal order may have distinct characters but both function to protect aliens, either by general principles of law or by the municipal law itself. In this regard, refugees are aliens who are entitled to the same protection available to all other non-refugees while in host states.⁴³⁸

2.4.1 The Formation of Customary International Law

The two components required for the construction of customary international law - general practice and acceptance as law or *opinio juris*⁴³⁹ - draw mixed opinions from scholars. Both sources of custom generate support for their importance, and there is a continuing debate over the weight that should be assigned to each requirement. Traditional and modern views place different importance on the sources. It has been established that, for a practice to become 'customary', it must be constant, uniform and considered mutually obligatory among states.⁴⁴⁰ State practices that are counted in this regard can be classified into verbal and physical act⁴⁴¹

⁴³⁵ Frank E. Krenz, 'The Refugee as a Subject of International Law' (1966) 15 Int'l & Comp. L. Q. 90, 91

⁴³⁶ Hans Kelsen, *Principles of International Law* (New York 1952) 243.

⁴³⁷ Hans Kelsen, *Principles of International Law* (New York 1952) 243.

⁴³⁸ Article 7 (1) of the CRSR; it only applies to contracting states.

⁴³⁹ Article 38 (1b) of the Statute of the International Court of Justice.

⁴⁴⁰ Malcolm N. Shaw, *International Law* (6th Edition, Cambridge University Press, UK 2008) 76; and James C. Hathaway, *The Rights of Refugee Under International Law* (Cambridge University Press, UK 2005) 34.

⁴⁴¹ Jean- Marie Henckaerts & Louise Doswald- Beck, Customary International Humanitarian law (Vol. 1, Cambridge University Press, UK 2009) p. xxxviii.

and they must be official act or conduct⁴⁴² of all organs of the state; the executive, legislative and judiciary constitute state practice,⁴⁴³ and the act must be made known/ communicate or disclosed to other states.⁴⁴⁴ Manuals on child protection published by the administrative agency, national legislation, case laws, diplomatic communications in time of refugee situation, diplomatic protests, opinion of official legal advisers relating to the matters at hand, decisions of the executive in respect of the children or refugee in general, submissions made to international courts, statement made in and at international organization or conference are examples of verbal acts.⁴⁴⁵ Official statement are considered as state practice in *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*,⁴⁴⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*⁴⁴⁷ and *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*.⁴⁴⁸ Support for considering verbal acts as state practice also come from the International Law Commission when it concluded statement of government representative as state practice.⁴⁴⁹

Uniformity of the practice should be substantial, not absolute, and it has to be consistent without the presence of significant uncertainty, fluctuation, contradictory practice and

⁴⁴² Jean- Marie Henckaerts & Louise Doswald- Beck, Customary International Humanitarian law (Vol. 1, Cambridge University Press, UK 2009) p. xxxix.

⁴⁴³ The Lotus Case (France v Turkey) 1927, P.C.I.J Reprts, Series A, No. 10. P. 23-26.

⁴⁴⁴ Jean- Marie Henckaerts & Louise Doswald- Beck, Customary International Humanitarian law (Vol. 1, Cambridge University Press, UK 2009) p. xl

⁴⁴⁵ Jean- Marie Henckaerts & Louise Doswald- Beck, Customary International Humanitarian law (Vol. 1, Cambridge University Press, UK 2009) p. xxxviii.

⁴⁴⁶ ICJ Reports 1974

⁴⁴⁷ ICJ Reports 1986

⁴⁴⁸ ICJ Reports 1997

⁴⁴⁹ ILC, Draft Articles on State Responsibility, *Yearbook of the ILC*, 1980, Vol. II, Part 2, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2), 1980, pp.34–52.

discrepancy.⁴⁵⁰ The ICJ in the *Fisheries Case* (1951)⁴⁵¹ stressed that claims made by states without assertive acts do not amount to practice as required. In relation to the generality of practice, which is a relative concept, no specific number of states can be ascertained or determined but it shall take into account the participation of states including the reaction of other states towards such practice.⁴⁵²

It has been established that only general acceptance and not absolute recognition of a practice is required to create customary law; thus, states that have not consented to the rule and do not object to it will be bound by the rule. Half the total number of states could be insufficient to strike 'generality'; in fact, a large majority is required.⁴⁵³ The practice should also indicate an extensive acceptance among states whose interests are particularly affected.⁴⁵⁴ Case law shows that generality depends on the evidence available, as any particular number is not enough to prove generality in all circumstances, but universality of practice or unanimous practice is not requisite.⁴⁵⁵ In some case law, it is sufficient to prove that the practice is generally accepted and very widespread, and that there is a representative participation among

⁴⁵⁰ See, for example, *Fisheries Case* (United Kingdom v Norway) ICJ Reports (1951), p. 116-144, *Colombian- Peruvian Asylum Case*, ICJ Reports (1950) p. 266- 388, and *North Sea Continental Shelf Case*, ICJ Reports (1969) p. 3- 56.

⁴⁵¹ *Fisheries Case* (United Kingdom v Norway) ICJ Reports (1951) 191.

⁴⁵² See Michael Akehurst, 'Custom as a Source of International Law' in *The British Year Book of International Law* 47 (1974-75) 1, 18.

⁴⁵³ See *South West Africa 'Cases*, ICJ Reports (1966) p. 291.

⁴⁵⁴ See *Fisheries Jurisdiction Case* (United Kingdom v Iceland) ICJ Reports (1974) at p. 3, para 23- 26.

⁴⁵⁵ See Michael Akehurst, 'Custom as a Source of International Law' in *The British Year Book of International Law* 47 (1974-75) 1, 18; Ian Brownlie, *Principles of Public International Law* (7th Ed, Oxford University Press, Oxford 2008) 7; and Josef L. Kunz, 'The Nature of Customary International Law' (1953) 47 (4) *The American Journal of International Law* p. 662- 9.

states, for example according to region.⁴⁵⁶ Besides universal customary rule, regional customary rule may crystallise when a prevalent practice is established within a region.⁴⁵⁷

More importantly, no specific time and duration is required to transform a certain state practice into custom provided that consistency and generality of practice can be proved.⁴⁵⁸ In extreme situations where precedents or prior practice are absent, custom could emerge instantly.⁴⁵⁹ But this runs contrary to the views of those who maintain that the practice should reach immemorial usage and without interruption. In the North Sea Continental Shelf Case,⁴⁶⁰ it was held that a ten-year period after a treaty was signed, with the treaty coming into force five years later, was considered sufficient to create customary rule. The second component of CIL, the *opinio juris*, demands that the practice be accepted and acknowledged as law, and that states voluntarily agree to be bound by the 'law'.⁴⁶¹ The phrase 'accepted as law' in Article 38 (1b) points towards the acknowledgment and recognition by states that the practice is observed because it is a legal requirement and that failure to 'practise' is a violation of its obligation.

⁴⁵⁶ See G.I. Tunkin, *Theory of International Law* (Harvard University Press, 1974) p. 118, Fisheries Jurisdiction Case (United Kingdom v Iceland) ICJ Reports (1974) at p. 3, para 23- 26 North Sea Continental Shelf Case, ICJ Reports (1969) at p. 4, para 42.

⁴⁵⁷ See Atle Grahl-Madsen, *The Status Of Refugees In International Law* . (Vol.1, Sijthoff, Leyden 1966) 42.

⁴⁵⁸ See Ian Brownlie, *Principles of Public International Law* (7th Ed, Oxford University Press, Oxford 2008) 7.

⁴⁵⁹ In Bin Cheng, "United Nations Resolution on Outer Space: 'Instant' International Customary Law?" (1965) *The Indian Journal of International Law* p. 35- 36.

⁴⁶⁰ ICJ Reports (1969) at p. 43, para 74.

⁴⁶¹ See James C. Hathaway, *The Rights of Refugee Under International Law* (Cambridge University Press, UK 2005) 34.

Two factions - the traditional and modern customs - give different weights to the element of state practice and *opinio juris*. On the one hand, the traditional custom deems general and consistent state practice to be the primary consideration, and *opinio juris* can be derived from actual state practice. Traditional custom puts greater weight on action than what the state actually believes or publicly expresses. Making such an inference will give rise to certain difficulties, especially when state practice fluctuates and is inconsistent from time to time. There are also international law authors who simply reject the psychological element, or the *opinio juris sive necessitates*, in the qualification of customary international law, and who rely solely on practice.⁴⁶²

On the other hand, the modern custom attaches greater importance to what states express or declare rather than how they act⁴⁶³ because a state may know that a certain rule imposes an obligation upon it but it continues to act in the opposite manner. This group believes that *opinio juris* is vital in determining customary rules but that general practice is not because customary rules can sometimes develop instantaneously even though the practice has never generally taken place.⁴⁶⁴ This approach places great emphasis on state consent, which is the basis of international legal order. The relevant proof of acknowledgement or acceptance as law could include the assurance and conviction of policy-makers that certain practice is obligatory and has reached customary status.⁴⁶⁵ To modern custom, contrary action by a state

⁴⁶² See Hans Kelsen, *Principles of International Law* (New York 1952)307.

⁴⁶³ Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 Am. J. Int'l. L. 757- 758; and Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Mich. J. Int'l. L. 115, 141- 161.

⁴⁶⁴ See Bin Cheng, "United Nations Resolution on Outer Space: 'Instant' International Customary Law?" (1965) The Indian Journal of International Law p. 35- 36.

⁴⁶⁵ See Anthony D' Amato, *The Concept of Custom in International Law* (Ithaca, London 1971) 34- 41.

pertaining to a rule is unimportant in determining its stance when it has already openly expressed the obligatory nature of a particular rule. Hence, states can be said to have simply accepted a rule or practice as constituting a customary rule even where they never act in conformity with the rules. These two divided opinions reflect that there is a hierarchy of elements, one of which must be given more credence than the other, and they arrived at different conclusions.

In recent decades, some scholars have expanded the qualifications of the rule but the basic element of practice and *opinio juris* remain in all requirements. Both the behaviour and conviction of a state can be determined through various sources and in numerous forms: media, historical records, statements of government authorities, official government publications, autobiographies of past leaders, official government manuals for specific legal issues and questions, diplomatic interchanges, statements and opinions of national legal advisors, court decisions and national legislation.⁴⁶⁶

2.4.2 Choice of Approach to Determine CIL Appropriate for the Present Study.

In the presence of opposing views, one vital question needs to be answered. Is there a need to take a stand and choose a view to which the present study should adhere in order to determine the customary status of the *non-refoulement* principle? In deciding whether a particular rule has reached customary status, the present research will not adopt a single approach: choosing the traditional custom over the modern custom or vice versa. This is because each approach

⁴⁶⁶ See Malcolm N. Shaw, *International Law* (6th Edition, Cambridge University Press, UK 2008) 82.

has its own strengths. This study takes the view that the application of two different approaches will be more beneficial than limiting our choice to only one. Studies have suggested that states adopt different attitudes to different rules and obligations. A state may consistently express its views on matters regarding its own interest and remain silent on other rules. In another situation, a state may be actively engaged in the practice of a certain rule but make no statement about its sense of obligation. Taking into account the possible circumstances, this study will adopt both approaches to accommodate diverse states' responses to separate rules.

Were we to adopt the modernist view, alert and active states would be prone to expressing their sense of obligation regarding certain rules (for various reasons and intentions) but would act in the opposite way. Conversely, if just the traditional custom view is to be adopted, we could be facing a phenomenon where acts of courtesy, acts carried out in the name of camaraderie among states in a region, and reciprocal acts performed out of gratitude or as political gestures are treated as acceptance of a practice. This study suggests that it is safer and fairer to employ both approaches, where possible, to determine a customary law, and where a rule is considered customary by at least one approach, it can be treated as such.

However, the two approaches still have one thing in common: that a state that persistently and expressly objects to the rule during its formation and after its creation can be exempted from the rule. Even where a state continues to breach a particular rule in its practice, but makes no objection to its obligation under a particular rule, the absence of express and persistent or

vigorous objection will be taken as no objection. For instance, in the acceptance of the principle of *non-refoulement* as a customary rule, it is crucial to identify Malaysia's practice before, during and after its formation to clarify its obligation under the rule, its express objection and the implementation of the rule in administrative actions and decisions and application by domestic courts.

2.4 CONCLUSIONS

This chapter has demonstrated that the existing international legal framework for the protection of refugees may offer reasonable protection for refugees but it is far from children-centred. This is evidenced by the absence of specific reference to children in the provisions of the CRSR at its Protocol. As a response to the inadequacy, the UNHCR has devised and developed various non-binding documents in order to redress the *lacunae* but this again is not as durable as the express provisions under the law. Undeniably, the legal position of refugee children and their rights are protected under the international legal regime. Despite the weaknesses highlighted in the CRSR, refugee children can rely on complementary protection mechanism, which includes the UNCRC and customary international law. It also shows that the institutional framework of refugee protection, which comprised the UNHCR, is facing growing challenges that lies in the increase of the number of refugees and other persons of concern who fall under its mandate and the procedural challenge relating to its work in screening asylum-seekers on behalf or *in lieu* of a state's own machinery.

From the IHRL perspective, refugee children are entitled to enjoy certain rights and protection, especially when there is a huge potential for the UNCRC to be utilised in the name

of complementary protection to confer better protection on refugee children, especially in states that are not party to the 1951 Convention. Theoretically, protection under the UNCRC can be further strengthened by the principle of *non-refoulement*. However, since the UNCRC has not yet been adopted by the legislature, reliance on the UNCRC becomes almost impossible. Such a situation makes customary international law relevant to Malaysia. It is also clear that the UNHCR's broader mandate to protect other persons of concern besides the refugee Convention and its role in non-contracting states is crucial as an initial step in protecting refugee children who will otherwise have an insufficient platform and standing to claim protection and refuge, even on a temporary basis, in those states. Nevertheless, without real power to enforce its mandate, the work of UNHCR is reduced to 'the least we can do' effort.

The next step of this study is to analyse the legal position of refugee children under Malaysian law. Chapter 3 seeks to provide the legal background underpinning the protection of refugee children in the country, which contributes to the dilemma and predicament of the group.

CHAPTER 3

THE PROTECTION OF REFUGEE CHILDREN UNDER THE MALAYSIAN LEGAL FRAMEWORK

3.1 INTRODUCTION

Refugee children continue to find themselves in a complicated situation in Malaysia even though Malaysia has vast experience in hosting a large number of refugees since 1970s. The presence of refugee children and their community in Malaysia gives rise to protection issues for the group and have caused agitation to the authority and the society with regard to security and social issues.¹ The legal status of refugee children remains unresolved and not sufficiently addressed. In Malaysia, news on ‘problems’ allegedly caused by refugee children are commonly reported and debated while effort for the advancement of refugee protection is seasonal and more frequent among the NGOs. It is important to identify the basis for refugee children to claim protection under Malaysian law even though the Malaysian legal framework does not expressly provide protection for children who are being persecuted.²

¹ See for example HHS KHY HA, ‘UNHCR Asked to Verify Status First Before Issuing Refugee Cards’ Bernama (Malaysia, 19 Feb 2009); NMR HK MIS, ‘Police Detain Myanmar Refugee Found With Fake Identity Card’ BERNAMA (Malaysia, 3 May 2009); and n.a., ‘Beggars using refugee Status to Draw Sympathy’ *New Straits Times* (Malaysia, 19 July 2003). VP RAR AZH, ‘MTUC Bantah Saranan UNHCR Ambil Pelarian Sebagai pekerja’ BERNAMA (Malaysia, 14 June 2005); n.a., ‘Beggars using refugee Status to Draw Sympathy’ *New Straits Times* (Malaysia, 19 July 2003); SZA AHH JK, ‘Nine Rohingya Refugees Break Into UNHCR for Protection’ Bernama (Malaysia, 17 June 2002); Roy Goh, ‘Refugee Status Declarations Not Recognised’ *The Sun* (Malaysia, 27 June 2001); n.a., ‘Immigrant Break Their Way Into UNHCR Compound’ BERNAMA (Malaysia, 30 March 1998); n.a., ‘Explosive Mixture Unearthed in Refugee Camp’ BERNAMA (Malaysia, 19 Jan 1996); and n.a., ‘Measles: Dept To Check on Refugee Camps’ *The Star* (Malaysia, 2 May 1987).

² Displaced people and forced migrants of the Southeast Asia is a testament that the states of origin have in a way or another failed to provide protection for its own people. See Riwanto Tirta Sudarmo, ‘Critical Issues in Forced Migration Studies and the Refugee Crisis in Southeast Asia (2007) UNEAC Asia Papers

The objective of this chapter is to examine the extent to which the rights of refugee children in international law are being protected under the Malaysian legal system. This chapter also looks at the implementation of UNCRC in domestic laws and discusses Malaysia's stand for not ratifying the CRSR. Discussion commences with the protection of basic rights of refugee children under the Federal Constitution; Child Act 2001; and Education Act 1996. Discussion then continues with the provisions of Immigration Act 1959/63 that affect the rights of refugee children. This is then followed by discussing Malaysia's perspectives of international law including the adamant rejection to ratify the CRSR; Malaysia's commitment as a state party to the UNCRC; state legal obligation in making the UNCRC part of national law; and Malaysia's participation in the Asian African Legal Consultative Council (AALCO).

3.2 PROTECTION OF CIVIL AND POLITICAL RIGHTS OF REFUGEE CHILDREN UNDER THE FEDERAL CONSTITUTION.

The protection of civil and political rights is found largely in the Federal Constitution that visibly pledges the fundamental liberties of individuals, adults and children alike. The guarantee of such rights are made under Article 5- 13 encompassing liberty of the person (Article 5); prohibition of slavery and forced labour (Article 6); protection against retrospective criminal laws and repeated trials (Article 7); equality before the law (Article 8); and prohibition of banishment and freedom of movement (Article 9); freedom of speech, assembly and association (Article 10); freedom of religion (Article 11); rights in respect to education (Article 12); and rights to property (Article 13). The fact that the term refugee does not exist in the basic legal instrument of the country does not exclude refugees from enjoying

the protection of the constitution. Where the word ‘person’ is used in the Federal Constitution, it should encompass citizens and non-citizens³ including refugees⁴ as in Article 5, 6, 7, 8, 11 and 13. As such, non-citizens are also entitled to personal liberty under Article 5. However, the protection of Article 5 is not absolute. Citizens and non- citizens can be deprived of the liberty in accordance with the law such as when a non-citizen is charged for an offence.⁵ The ‘law’ referred to in Article 5 must be specific and expressly provide for the deprivation⁶ and the provisions must be strictly complied⁷ with to ensure that it would not be misused and abused.

The case of *Sajad Hussain Wani lwn. Ketua Pengarah Imigresen Malaysia & Satu Lagi*⁸ has proved that a non- citizen is entitled to the protection against unlawful detention under Article 5 of the Federal Constitution. The appellant in this case had a valid visa for being in Malaysia and was detained under section 35 of the Immigration Act 1959/63 when the visa is still valid. He was never brought to the magistrate so he applied for the writ of *habeas corpus*. The court held that the detention is invalid for the failure of the authority to take him to the magistrate and it was done before the visa was revoked, and hence, he was ordered to be released.

³ Mohamed Suffian bin Hashim, *An Introduction to the Constitution of Malaysia* (2nd Edition Government Printer, Kuala Lumpur 1976) p. 214

⁴ A. A. A. Mohamed, et al, *Foreign Workers The Law and Practice in Malaysia* (CLJ Publication, Selangor 2013) p. 224.

⁵ In the case of *PP v Bird Dominic Jude* [2013] MLJU 900, the respondent was acquitted and discharged by the court for a drug trafficking offence. He claimed that after his acquittal and discharge, the authority should release him pending the appeal hearing by the Public Prosecutor. The court decided that an appeal is a continuation of a hearing and therefore the charge is still in operative and thus the respondent can be detained. The same principle applies in the case of *Merit & Anor v PP* in which 9 Thai nationals were arrested and detained pending appeal.

⁶ *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372.

⁷ *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245.

⁸ [2008] 2 CLJ 403

The provision of Article 8 on equality is of particular interest as it may be used to depict the applicability of legal protection for citizens on the refugees as well. The relevant provision: ‘all persons are equal before the law and entitled to the equal protection of the law’ lead to the comprehension that refugees should be treated equally like the citizens. Unfortunately, that is not the case. This provision makes every one subject to the same law and that no one is above the law. It also means that every person is shall enjoy the protection of the law. The case of *Ali Salih Khalaf v Taj Mahal Hotel*,⁹ an Industrial Court’s case is illustrative of the point. Here, the Court agrees with the submission of the counsel that the claimant, a refugee who previously works at the hotel is protected under the Industrial Relations Act 1967 by virtue of Article 8 of the Constitution.¹⁰

The word ‘law’ here includes procedural law and thus an unfair or arbitrary procedure shall be invalid.¹¹ Furthermore, this provision is restricted by clause (2) that declares only citizens are protected from discriminatory legislations which discriminate people on the ground of religion, race, descent or place of birth.¹² These are legislation in relation to acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. Thus any legislation on this matter that discriminate non- citizens is allowed as there no such prohibition of discrimination against them. However, legislations not relating to the subject matters in Article 8 should not be discriminatory to

⁹ [Industrial Court Of Malaysia [Case No: 22(27)/4-1580/12] Between Ali Salih Khalaf And Taj Mahal Hotel, Award No. 245 Of 2014. The case is also reported at [2014] 2 LNS 0245.

¹⁰ Industrial Court Of Malaysia [Case No: 22(27)/4-1580/12] Between Ali Salih Khalaf And Taj Mahal Hotel, Award No. 245 Of 2014, P. 7-9.

¹¹ Court of Appeal in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* (1996) 1 MLJ 261, 286.

everyone; citizens and non-citizens on any ground. Thus, legislations such as child protection applies similarly to children who are citizens and non- citizens such as refugee.

Equality in Article 8 does not mean that each and every citizen shall be treated equally.¹³ or that non- citizen and citizens should receive equal treatment. The approach is not simply to treat all citizens and refugees alike in all circumstances but to treat all citizens and refugees alike when they are in similar circumstances. This is so suggested in the case of *Datuk Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, where Suffian LP explained the principles pertaining to equality under Article 8 as follows:

“1. Equality provision is not absolute which means that it does not mean all laws must apply uniformly to all persons in all circumstances everywhere.

2. Equality provision is qualified as exemplified by Article 8 (5) and Article 153.

3. The prohibition on unequal treatment applies not only to the legislature but also to the executive as can be seen in the words of “public authority” in Article 8(4) and “practice” in Article 8(5)(b)

4. The prohibition applies to both substantive and procedural laws.

5. There may be lawful discrimination as specified by Article 8(5) such as Muslim as opposed to non-Muslims, residents in particular states as opposed to others and Malays and natives of Borneo as opposed to others

6. The first question to ask is whether the law is discriminatory and if it is not, is it a good law. If it is discriminatory one should see whether such discriminatory falls within the exception allowed by the constitution

7. The doctrine of classification is acceptable subject to the sixth principle above and the court retains the power to examine the reasonableness of classification by the legislature

¹³ *Datuk Harun Idris v Public Prosecutor* [1977] 2 MLJ 155.

8. *In cases where the law is silent, the procedures that are more drastic and prejudicial are constitutional.*

9. *There is a presumption that an impugned law is constitutional- **a law must operate alike on all persons under like circumstances, not simply that is must operate alike on all persons on all circumstances.***” [emphasis added]

Much later, it was ruled by the court in *Ahmad Tajuddin bin Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 that discriminatory per se is not actionable. In order to succeed the plaintiff must prove that the alleged discrimination was both unfair and resulted in harm or injury. These cases are mentioned here to suggest that refugees cannot easily allege that a particular action; or decision of the authority; and or legal provision discriminate them. To benefit from the protection of Article 8, refugees must display that the discrimination is not allowed under the constitution and it had caused them damage.

The restriction of Article 8 (2) and the acceptance of discrimination practice by the courts however, will not deny the fact that refugees are still entitle to claim equal law protection of the law in relation to their applicable rights such as freedom of religion.¹⁴ As for education, Article 12 (1) inhibits equality by allowing discrimination against non- citizens on admission and payment of fees. Thus, it is considered lawful for the authority to make laws imposing conditions that might prejudice the admission of refugee children into public schools.

¹⁴ Federal Constitution, Article 11, for full provisions, please refer to Appendix.

Meanwhile, as Articles 9, 10 and 12 use the term ‘citizen’, non-citizens are excluded from the protection of the articles.¹⁵ However, this is not a green light for the authority to deny the movement, speech, assembly, and their education blatantly. The implication is that the authority can impose restrictions for instance, on the movement of non-citizens by enacting laws and regulations to that effect¹⁶ As such, the permission of entry to Malaysia can be granted with a condition¹⁷ for example the Filipino refugees who are only permitted to stay or reside in designated areas in Sabah.¹⁸ In addition, non- citizens including refugees can be subjected to laws that provide for deportation or return as part of its punishment. This is so provided in Section 31 (removal of prohibited immigrants), 32 (removal of illegal immigrants) and 33 (removal of persons unlawfully remaining in Malaysia) of the Immigration Act 1959/63.

As for the right to speech and freedom of expression, there are a number of legislations that impose restriction for citizens and non- citizens and there are considered valid and constitutional by the court.¹⁹ In relation to right to education, non- citizens cannot freely access the education system in Malaysia as they have to pay a fee to enrol to public primary and secondary school.²⁰ Aggrieved individuals may seek a declaration that the government’s

¹⁵ The judgement of Suffian LP in the case of *Government of Malaysia & Ors. V Loh Waf Kong* [1979] 2 MLJ 33, 34.

¹⁶ *Harmenderpall Singh A/L Jagara Singh V Public Prosecutor* [2005] 2 MLJ 542.

¹⁷ See *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105.

¹⁸ Immigration Act 1959/63, section 54 . See discussion on Filipino refugees in Chapter 4.

¹⁹ *Dow Jones Publishing Company (Asia) Inc V Attorney General* [1989] 2 MLJ 385. The law that gives discretionary power to the Minister to restrict the sale of a foreign newspaper is declared valid.

²⁰ Refer to the rules made under the Education Act 1996, *Penerimaan Masuk Murid Bukan Warganegara Ke Sekolah Kerajaan Dan Bantuan Kerajaan* (Akta Pendidikan 1996) (Admission of Students Who Are Not Citizen to Public School and Government Funded School) ; and a government circular, *Pekeliling Bahagian Kewangan Bil. 4/2000. Peraturan Kutipan Fee Sekolah Yang Dikenakan Kepada Murid Asing.*

conduct is invalid or unconstitutional if certain acts of the government are contrary to the provision of the constitution or when it breaches the principle of Administrative Law.²¹

3.3 LAWS ON CHILD PROTECTION AND CHILD'S RIGHTS

Malaysian legal framework on the protection of children from abuse, violence, labour exploitation, protection of rights and juvenile justice lies in various statutes but each statute is far from providing enough safeguard for the protection of the rights of the child as guaranteed under the UNCRC. Discussion in this section will show the limit and constraint of Malaysian law in providing protection for children and refugee children as opposed to the rights warranted by the international law.

3.3.1 Child Act 2001

The Child Act 2001 (Act 611) is a milestone of child protection regime in Malaysia. It has consolidated and repealed three previous statutes: Child Protection Act 1991 meant to provide care and protection to child victims of abuse or at risk of abuse; and Women and Girls' Protection Act 1973 intended to protect women and children exposed and involved in immoral vices; and the Juvenile Courts Act 1947 which establish the Juvenile Court that deals with child offenders. The enactment of the Child Act 2001 was borne out of Malaysia's obligation as a state party to the UNCRC from 1995. It is claimed that provisions of the Child Act are formulated based on the four core principles of the UNCRC: non-discrimination, best

²¹ For instance *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134. The appellant is an American citizen who applied for the writ of certiorari when his employment pass was cancelled and he was ordered to leave Malaysia for his failure to comply with the conditions imposed on the pass.

interest of the child, the right to life, survival and development and respect for the views of the child²² but this is easier claimed than proven.

A child is defined under the Act as a person under the age of eighteen years; and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act 574].²³ Under the Child Act 2001, children who are victims of abuse and children offenders are now dealt with under a single piece of legislation. The main contents of this Act provides for specific protection of children from abuse, neglect, and trafficking; provides for the care and rehabilitation for child victims and child offenders; and provides for the establishment of the Courts for Children.²⁴ These provisions guarantees children's right to life, survival and development as enshrined in Article 3 and 6 of the UNCRC. The Act also criminalises procurement of children for the purpose of prostitution, trafficking and abduction; another manifestation of Article 3 and 6. Additionally, it protects the right of a child to be with his/ her family.

In line with Article 2 of the UNCRC that prohibits discrimination, the Preamble of the Child Act 2001 provides that every child is entitled to protection and assistance in all circumstances without discrimination for the reason of race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any status. The preamble should be taken as part of the Act, so that even though the Act does not specifically declare that the Child Act 2001

²² Ministry of Women, Family and Community Development, 'Implementation of the Convention on the Rights of the Child Malaysia's First Report' (2006) 37.

²³ Child Act 2001, Section 2.

²⁴ Child Act 2001, Section 11.

shall apply to all children equally without any discrimination whatsoever, the preamble should be taken literally, and this should mean that citizenship and immigrant status should not affect the protection and assistance that children are entitled to under the Act. The preamble is a strong basis to extend similar scope and standard of protection to each child including refugees who are in the Malaysian jurisdiction. The requirement to apply the principle of the BIC can be found in various sections of the Act.²⁵ Unfortunately, a child's right to participate and express his/ her views as provided in Article 12 of the UNCRC is not expressly embedded in any of the provisions in the Act. The type of protection offered under this Act is confined to protect victims or potential victims against abuse, neglect, and abandonment. Another type of protection is provided for criminal justice when dealing with child offender comprising of the trial of child offender, rehabilitation, and correction.

3.3.1.1 Protection for Refugee Children Under Child Act 2001

No doubt, on the principle of equality, refugee children are protected under this Act.²⁶ A child refugee can be classified as a child in need of care and protection under the Act if he/she is subjected to abuse or risk of abuse; has been neglected or abandoned; in need of medical treatment; when he/she behave in harmful manner; or when he/she cannot be controlled by the parent or guardian; when family relationships are seriously disrupted; or when he/she is begging on the street.²⁷ When a person is in need of care and protection, he/she can be taken

²⁵ Child Act 2001: Section 18, 30, 35, 37, 40, 42, 80, 84, 89 & 90. For instance Section 30. (5) In determining what order to be made under subsection (1), the Court For Children shall treat the **best interests** of a child as the paramount consideration.

²⁶ See discussion in previous section 3.2.

²⁷ Child Act 2001: Section 17 (1) (a)-(k)

into temporary custody if it is in the best interests of the child.²⁸ If medical examination or treatment is required, he/she can be presented to a medical officer²⁹

Section 17 of the Act covers a wide range of situation that refugee children can find themselves in. However, various reasons can prevent them from coming forward and claim such protection. This includes lack of identify and travel document which caused their presence to be invalid and thus they choose to shy away from accessing the avenue to seek help and protection. Their invisibility from the community and the authority is another reason since their plight cannot be easily traced or identified. Refugee children may be registered with the UNHCR office but not to the Malaysian authority; they are not in public school; and seldom access the public healthcare facilities. If refugee children are not recognised and registered, they become invisible from the authority and community. Their invisibility means that their condition and welfare cannot be monitored. There are high possibilities that their situation will remain undiscovered and hidden. If they are in school, teachers may be able to recognise the child in need of protection. So is the case with doctors. Furthermore, refugee community may not be exposed to the information.

It must be noted that the Child Act 2001 is meant to protect children in circumstances, which are highly abusive for children. It is not specially designed to cater for children lacking legal status or whose fundamental rights as children are being violated such as children denied

²⁸ Child Act 2001: section 18 (a).

²⁹ Child Act 2001: section 20 (1).

primary education or healthcare. When the Act is said to have been guided by the guiding principles of the UNCRC, it may be concluded that the guidance is only applicable to a limited section of a child's life and rights. The Act does not in the first place declare the rights that every child should enjoy for being a child and the repercussion that arise when children are unable to exercise their rights. The CA concentrates too much on the content of the various Acts that it repealed but fails to include or declare fundamental rights of children under the UNCRC and other obligation of state parties towards children. It does not treat children as rights holders and has failed to take into account the reality of children issues in a wider perspective; and thus no recognition of children's rights is enunciated. In other words, the act is less dynamic than it should be and it may be concluded that the CA is only concerned with the way children should be dealt with when something unfortunate occurs or is about to happen.

All in all, Act 611 only protects children from various forms of abuse and means to handle children involved with criminal justice. It is still far from complying to the UNCRC since declaration of children's rights is absent from the provisions. The extent to which this Act can benefit refugee children cannot be ascertained because as to date, no case laws relating to the Act involve refugee children. It can be said that protection under the Act is significantly limited and is not an equivalent to the UNCRC. Children lacking legal status or whose fundamental rights as children are being violated such as the situation of refugee children whose right to primary education and healthcare being denied, will not find their remedy here.

3.3.2 Education Act 1996

Primary education is made compulsory in Malaysia under the Education (Compulsory Education) Order 2002,³⁰ an order under section 29A of the Education Act 1996:

“(1) The Minister may, by order published in the Gazette, prescribe primary education to be compulsory education.

(2) Every parent who is a Malaysian citizen residing in Malaysia shall ensure that if his child has attained the age of six years on the first day of January of the current school year that child is enrolled as a pupil in a primary school in that year and remains a pupil in a primary school for the duration of the compulsory education.”

The order only makes primary education compulsory but not free. Prior to 2012, it was a policy of the government to require students to pay a minimal fee or additional payment upon enrolment in primary and secondary school.³¹ This fee covers contribution for co- curriculum activities, preparation of internal question papers, annual sports day, religious activities, and insurance.³² As for secondary education, even though it is provided for free, it is not made compulsory. Even though they are not required to pay the above fee, school children attending

³⁰ *In exercise of the powers conferred by subsection 29A(1) of the Education Act 1996 [Act 550], the Minister makes the following order :*

1. *(1) This order may be cited as the Education (Compulsory Education) Order 2002.*
2. *(2) This Order comes into operation on 1 Jan 2003. Compulsory education*
2. *Primary education is prescribed to be compulsory education.*

³¹ Previously, parents are burdened with hefty fees but the Ministry issued a guideline which requires school to impose only minimal fees. Thus, parents have to pay RM24.50 (about £5) for primary school and RM33.50 (about £6.50) for secondary school. See n.a. “Yuran Sekolah tahun depan di Mansuhkan” Utusan Malaysia. 8/10/2011. Available at http://www.utusan.com.my/utusan/info.asp?y=2011&dt=1008&sec=Muka_Hadapan&pg=mh_03.htm Accessed 11 Jan 2012. Nevertheless, financial assistance is available for poor families. Beginning from 2010 all school children are granted RM100 assistance.

³² Surat Pekeliling Ikhtisas Bilangan 5/2009: Bayaran-bayaran Tambahan Persekolahan Bertarikh 26 Oktober 2009; Surat Pekeliling Ikhtisas Bilangan 14/2010: Pindaan kepada Surat Pekeliling Ikhtisas Bayaran-bayaran tambahan Persekolahan bertarikh 27 Oktober 2010; and Surat Pekeliling Ikhtisas Bilangan 6/2006 Pemantapan Pelaksanaan Skim Takaful Pelajar Sekolah Menengah Malaysia Bagi Semua Murid Prasekolah, Sekolah Rendah dan Sekolah Menengah Di Sekolah-Sekolah Kerajaan dan Bantuan Kerajaan Bertarikh 30 Mei 2006. .

public schools still have to pay a fee for school magazine,³³ meal (if they are enrolled to boarding school),³⁴ and to Parent Teacher Association.³⁵ There is only a reduction of fee not fully free. Though the amount could be classified as nominal, as long as they are compulsory payment, it does not conform to the standard set by the UNCRC in Article 28. However, only children who are citizens can enjoy primary and secondary education for free,³⁶ whereas non-citizens will have to pay a charge.³⁷ Again this is a non-compliance to the standard set by the UNCRC.

A child who has attained the age of six years on the first day of January of the current school year must be enrolled as a pupil in a primary school and remains a pupil in a primary school for the duration of the compulsory education³⁸ which is 6 years and may also be completed in 5 or 7 years.³⁹ Parents are obliged to enrol their children and keep them enrolled throughout the 5-7 years period. Those who violate the provision of this section by failing to enrol a child for the compulsory primary education shall be liable to a fine of not more than RM5000⁴⁰ or to an imprisonment of not more than six months or to both.⁴¹

³³ Peraturan-peraturan Pendidikan (Majalah Sekolah Dan Bahan Multi Media) 1998. Para. 8 (2) (d).

³⁴ Surat Bahagian Kewangan, KP(BKEW/BT) 1800/D Jld. 3 (33) Bertarikh 11 Nov 2009

³⁵ Peraturan-Peraturan Pendidikan (Persatuan Ibu Bapa Guru) 1998. Para 5 (4).

³⁶ See n.a. "Yuran Sekolah tahun depan di Mansuhkan" Utusan Malaysia. 8/10/2011. Available at http://www.utusan.com.my/utusan/info.asp?y=2011&dt=1008&sec=Muka_Hadapan&pg=mh_03.htm Accessed 11 Jan 2012.

³⁷ Pekeliling Bahagian Kewangan Bil. 4/2000. Peraturan Kutipan Fee Sekolah Yang Dikenakan Kepada Murid Asing and Penerimaan Masuk Murid Bukan Warganegara Ke Sekolah Kerajaan Dan Bantuan Kerajaan

³⁸ Education Act 1996, Section 29A (2).

³⁹ Education Act 1996, Section 29.

⁴⁰ Approximately 900 pounds.

⁴¹ Education Act 1996, Section 29A (4).

Even though the Act does not expressly discriminate children on the ground of their citizenship status, a rule made under the Education Act 1996 only allow the admission of four categories of non- citizen children to public funded schools: children of embassy personnel, children whose parents hold valid working permit, children of permanent resident and children selected by the authority of the country of origin to study in Malaysia under a memorandum of agreement or understanding between the Malaysian government and the government of the children's country of origin.⁴² This implies that refugee children cannot go to public school unless their parents have a valid working pass. Nevertheless, even if refugee children are accepted in public schools, there are requirement that limit the enrolment of refugees. First, it is a requirement for a child to be registered using his/ her birth certificate and travel document. Secondly, primary and secondary charge students a fee between RM150-350⁴³ per year and other fees for various purposes. These two practices have impeded refugee children's access to public school. In many cases refugee children may not have their birth certificates and thus are not able to register. If they do register, their parents are not capable to fund the payment charged by the school. Furthermore, other related expenses such as for school uniform, books and transportation are also significant obstacles.

Besides that, compulsory primary education is only applicable to citizens. Section 29A (2) only put the responsibility to register a child who has reached six years on 1st January on parents who are citizen residing in Malaysia. Impliedly, this only makes primary education compulsory for children whose parents are Malaysian citizens because children whose parents

⁴² Penerimaan Masuk Murid Bukan Warganegara Ke Sekolah Kerajaan Dan Bantuan Kerajaan.

⁴³ This is around 30-70 pounds a year.

are not citizens are not committing any offence if they fail to register their children. Refugee and asylum seeking parents have an option whether or not they want their children to get primary education and this comes with a price, high fees. By imposing compulsory education for nationals only and providing it for free only for citizens, the authority is keeping a distance from issues concerning refugee children not getting primary education which is inconsistent with the UNCRC.

3.4 PROTECTION UNDER THE IMMIGRATION LAW

Immigration law in the country is fundamentally based on the Malaysian Immigration Act 1959/63, Passport Act 1966 and regulations made under these Acts such as the Immigration Regulations 1963 and Immigration Regulations 1967. Discussion and deliberations on Malaysian immigration law as a branch of public law is not commonly found in academic journals, a position that is quite strange for a state that has been receiving a significant number of immigrants. One would expect that provisions regarding refugees could be found in the Malaysian Immigration Act 1959/63 (Act 155) but that is not the case in Malaysia as the Act neither mentions refugee in its provisions nor provide any procedure relating to refugee status.

In general, the provisions of the Immigration Act 1959/63 apply to every regular person entering Malaysia and refugees alike without exception. Thus, refugees are bound to fulfil any legal requirement for the purpose of entering and remaining ⁴⁴ in the country as specified under the Act and will be exposed to the risk of being detained, charged, convicted, fined,

⁴⁴ Immigration Act 1959/63, section 5, 6, 7 & 15.

imprisoned, whipped and deported for any breach.⁴⁵ In fact, the term refugee is nowhere to be found in the Act and thus no separate treatment will be granted than to other regular migrants. The Act is a device utilised to combat illegal entry and stay and not a tool to protect refugee or any person who claims to be victim of human rights violation and persecution that can tolerate illegal entry and stay by reason of seeking refugee from persecution.

The Act governs all entries; by land, sea and air into Malaysia and the requirement of valid permit and travel document for such entry and stay. Persons entering Malaysia without valid permit or pass are considered ‘illegal immigrant’ i.e. persons other than citizen who contravene the provisions of section 5, 6, 8, 9, or 15 of the Immigration Act 1959/63; and provisions of regulation 39 of the Immigration Regulations 1963.⁴⁶ This part discusses provisions of the Immigration Act that have negative impact on refugees. It also looks at the possibility of utilising certain provision of the Act to confer temporary protection to the group.

3.4.1 Prohibition Of Entry Through Unauthorized Point Of Entry and Entry Without Valid Permit

Section 5 of the Act makes it an offence for any person to enter Malaysia through non-prescribed or unauthorized points of entry. The use of unapproved route such as through the river which has been used by many people for many years falls under this section as shown in

⁴⁵ Immigration Act 1959/63; section 6, 15 (4), 32 (1) & 57.

⁴⁶ Immigration Act 1959/63; Section 55E (7).

the case of *Lee Yee Kew v. United Oriental Assurance* (1998) CLJ 763⁴⁷ Section 2 of the act define entry as:

- . “(a) in the case of a person arriving by sea, disembarking in Malaysia from the vessel in which he arrives;
- . (b) in the case of a person arriving by air at an authorized airport, leaving the precincts of the airport;
- . (c) in the case of a person entering by land and proceeding to an immigration control post in accordance with section 26, leaving the precincts of the post for any purpose other than that of departing from Malaysia by an approved route; and
- . (d) in any other case, any entry into Malaysia by land, sea or air.”

In the case of *PP v. Jagtar Singh & Ors*,⁴⁸ the fact that the accused did not proceed to immigration control post when they arrive from Thailand, instead they went to the Duty Free Zone, amount to ‘entry’ under this section. In refugee situation,⁴⁹ this offence can be penalised under section 57 with a fine not exceeding ten thousands ringgit and to imprisonment to a term not exceeding five years or to both.⁵⁰ This provision can easily catch refugees as it is a common knowledge that many of them travel without legal documents, and they are likely to travel i.e. leave their country of origin and enter another country clandestinely and through unauthorized point of entry to evade the authority.⁵¹ Things can

⁴⁷ (1998) CLJ 763.

⁴⁸ [1996] 2 CLJ 709.

⁴⁹ Immigration Act 1959/63, Section 5 5:

“(1) The Minister may, by notification in the Gazette, prescribe approved routes and declare such immigration control posts, landing places, airports or points of entry, as he may consider to be necessary for the purposes of this Act, to be immigration control posts, authorized landing places, authorized airports or authorized points of entry, as the case may be, and no person shall, unless compelled by accident or other reasonable cause, enter or leave Malaysia except at an authorized landing place, airport or point of entry.

(2) Any person who contravenes subsection (1) shall be guilty of an offence against this Act.”

⁵⁰ Immigration Act 1959/63, Section 57:

“Any person guilty of an offence against this Act for which no special penalty is provided shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.”

⁵¹ Rozallin Hasyim, Imigresen Akan Perketat Kawalan Semua Pintu Masuk. *New Sabah Times* (Sandakan, n.a) <http://www.newsabahtimes.com.my/nstweb/print/66857> accessed 5 Oct 2013. It was reported that

become more complicated when a refugee is detained and cannot be deported or removed from Malaysia because the country of origin cannot be ascertained. It is possible that he/ she will remain in detention for a long time.⁵²

3.4.2 Prohibition of Entry Without Valid Permit

Under section 6 (1), entry without valid permit or pass is an offence.⁵³ Such offence is punishable by a fine not exceeding ten thousands ringgit and to imprisonment up to five years or to both and shall be liable to whipping of not more than six strokes.⁵⁴ Records show that refugees have been charged for offences under this section. In *Tun Naing Oo v. PP*.⁵⁵ the appellant was charged under section 6 (1)(c) for entry to Malaysia without valid permit. He did not have a passport when he was arrested at his workplace and he had no valid working permit. However, he has registered himself to Alliance of Chin refugee, a community group which assisted him with the refugee status application to the UNHCR Kuala Lumpur. On conviction, the appellant was sentenced to 100 days imprisonment and two strokes of whipping and appealed against the sentence of whipping. In allowing the appeal the court pointed to the purpose of the whipping, which is reserved for immigration offence involving crime of violence and brutality, which was not present in the arrest of the appellant. The court further added that refugees and asylum seekers in Malaysia are bound by all domestic laws

Sandakan, a coastal district in Sabah has more than 30 unauthorised point of entry being used by illegal immigrants..

⁵² In the case of *Lui Ah Yong V. Superintendent Of Prisons, Penang* [1975] 1 LNS 91, the applicant applied for habeas corpus after remaining in detention for 9 years pending removal order. He was charged with illegal entry from China and using a forged identity document. Because the authority failed to engage with any country to accept the applicant, he was kept in detention.

⁵³ Immigration Act 1959/63, Section 6.

⁵⁴ Immigration Act 1959/63, Section 6 (3)

⁵⁵ [2009] 6 CLJ 490.

and Immigration Act 1959/63 is one of them. However, whipping will not serve any purpose in the present case and it would be inhumane to do so.

In the case of *Kya Hliang & Ors v Pendakwa Raya* [2009] MLJU 18, 11 appellants appealed against the conviction under section 6 (1) of the Immigration Act 1959/63 and sentenced them to one month imprisonment and 1 stroke of whipping each. In mitigating the sentence the High Court stated this:

“In the present case the offenders are refugees who have escaped from their own country. They came not by choice. They are seeking asylum and shelter in Malaysia. However, in entering Malaysia without a valid entry permit they have committed an offence under Malaysian laws. This Court notes that the offenders have pleaded guilty at the first instance. It is trite law that a timeous plea of guilt is a mitigating factor in the assessment of sentence. The offenders are also first offenders. There is no evidence of any violence or brutality involved. In these circumstances the sentence of imprisonment of 1 month is appropriate.

The imposition of whipping under s 6(3) is, however, not mandatory. It is only imposed if the trial Magistrate is of the view that it is appropriate. Taking into consideration the aforesaid circumstances as a whole, this Court is of the view that the sentence of whipping would be harsh and impose undeserved hardship upon the offenders. Whipping would be an inappropriate sentence in these circumstances. For the above reasons, the sentence of imprisonment of 1 month is affirmed but the sentence of whipping of 1 stroke is hereby set aside.”

While the court is unable to spare them from jail sentence as they are bound to enforce the Immigration Act, the refugees manage to escape whipping because of their status as forced migrant even without the UNHCR identification papers is used as a mitigating factor.

Earlier in *Iskandar Abdul Hamid v PP* (2005) 6 CLJ 505,⁵⁶ the appellant is a minor from Indonesia charged under section 6 (3) (c) of the Immigration Act 1959/63 at the Court for Children. He is a registered refugee with the Kuala Lumpur UNHCR office and asked the Magistrate's permission to allow an officer of the UNHCR to be present at the trial. The application was denied and he appealed to the High Court. The High Court judge accepted the appellant's position as a registered refugee and as a child, the hearing as provided under Section 12 (3) (b) and (c) of the Child Act 2001, allows 'responsible persons' to be present and the officer of UNHCR in this case falls under 'responsible persons'.⁵⁷

Meanwhile in the case of *Subramaniam Subakaran v. PP* [2007] 1 CLJ 470,⁵⁸ the applicant's claim as registered refugee with the UNHCR was not corroborated and there was no evidence

⁵⁶ His charge was later withdrawn by the prosecutor.

⁵⁷ Child Act 2001, Section 12 (3) :

No person shall be present at any sitting of a Court For Children except-

(a) members and officers of the Court;

(b) the children who are parties to the case before the Court, their parents, guardians, advocates and witnesses, and other persons directly concerned in that case; and

(c) such other responsible persons as may be determined by the Court.

⁵⁸ *Subramaniam Subakaran v. PP* [2007] 1 CLJ 470, 479-480:

“ [18] In the context of the 1951 Convention, the relevant article which I had to consider is article 31 - on refugees unlawfully in the country of refuge..”

[19] It is implicit from the above article that Contracting States shall not impose penalties on account of their illegal entry or presence on refugee provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[20] The facts of the case before the court indicated that the applicant was arrested for an offence under s. 6(1)(c) and punishable under s. 6(3) of the Act which is not the case as envisaged by article 31 of the Convention relating to the Status of Refugees 1951. The applicant did not present himself without delay to the authorities and show good cause for his illegal entry.

[21] In any event, I am in agreement with the views expressed by Siti Norma Yaakob FCJ (as she then was) in the case of *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara (supra)* that the 1951 Convention and the 1967 Protocol and Article 22 Convention on the Rights of the Child are not legally binding on the Malaysian courts. I am of the view that the court is not obliged or compelled to adhere to the 1951 Convention and the 1967 Protocol.

[22] To fortify my reasoning, reference is made to Article 2 of the 1951 Convention under the heading 'General obligations' which states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

produced by the counsel to prove the claim. He was charged under section 6 (1) and (3) of the Immigration Act 1959/63. In dismissing the application for revision, the court held that provisions of section 6 (1) (c) and section 6 (3) are applicable to refugees and asylum seekers. The court denied any state obligation under the CRSR particularly Article 31 that prohibits contracting states from imposing criminal penalties on refugee who are present in their territory without authorisation. However, despite the judge's assertion that the court is not bound to follow the CRSR, the court made a reference to the exception of Article 31⁵⁹ and Article 2⁶⁰ of the CRSR to support his decision to penalize the appellant.

The case laws above signify that the Immigration Act 1959/63 is applicable to refugees and asylum seekers but they can apply for mitigation of the sentence or even have the charge retracted if their status as refugees can be proved, either by proving registration to the UNHCR or the refugee community, or identity card issued by the UNHCR. Nevertheless, Section 6 (4) imposed the onus of proof on the accused. Thus, a person charged for invalid entry must endeavour to prove that he is not violating the provision of the section. The case of

[23] It follows that the applicant herein must obey the laws and regulations passed by Parliament failing which shall be liable to be prosecuted and punished like any other citizens of the country.

[24] The upshot of which, I find that the Immigration Act 1959/63 in general and in particular s. 6(1)(c) and s. 6(3) are applicable to the applicant as an asylum seeker and refugee; and that the 1951 Convention and the 1967 Protocol are not legally binding on Malaysian courts. Article 22 of the Convention on the Rights of the Child is not relevant because the applicant does not come within the definition of child under Article I as it applies to every human being below the age of 18 years old. The applicant herein was at the date of offence 27 years old. In the circumstances, in my view this is not a case in which I ought to interfere with the decision on the Magistrate's Court and accordingly dismissed the application for revision."

⁵⁹ "1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, **provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.***"[emphasis added]

⁶⁰ "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

*Pendakwaraya v. Wong Haur Wei*⁶¹ is illustrative of this point. The accused claimed that he did not know the law relating to foreign workers and was being cheated by another person who was supposed to arrange for the working permit of three migrant workers arrested at his factory. The High Court in reversing the decision to acquit the accused for being unfamiliar with the law and practice governing working permit stated that the accused had the burden of proof.

3.4.3 Prohibition Of Specific Class Of Person From Entering Malaysia

Section 8 defines prohibited migrants: persons who are not permitted to enter or, and remain in Malaysia for reasons specified under the subsections 1-6. If a refugee falls into any of the category of prohibited migrant,⁶² he or she may be denied entry. This is a situation where asylum seekers attempt to enter the country through valid channel and possess valid travel document but denied entry for failure to show that they have means to support themselves or will likely become a charge on the public.⁶³ Because it is the discretion of the immigration authority whether or not to allow entry, asylum seekers can be refused entry for any reason under section 8. In practice, the power of the Director General to declare a person as prohibited migrant extends to making the declaration while the person is already in Malaysia. A Jemaah Islamiyyah suspect was detained in 2001 under the Internal Security Act 1960. He made an application of *habeas corpus*. However, days before the expiry of the detention

⁶¹ [2008} 1 MLJ 670.

⁶² For example under section 8 (3) (a) any person who is unable to show that he has the means of supporting himself and his dependants (if any) or that he has definite employment awaiting him, or who is likely to become a pauper or a charge on the public; (m) any person who, being required by any written law for the time being in force to be in possession of valid travel documents, is not in possession of those documents or is in possession of forged or altered travel documents or travel documents which do not fully comply with any such written law; d (f) any person who procures or attempts to bring into Malaysia prostitutes or women or girls for the purpose of prostitution or other immoral purpose;

⁶³ Immigration Act 1959/63 Immigration Act 1959/63, section 46.

period, the Director General of Immigration issued a declaration that made him a prohibited migrant and ordered him to be removed.⁶⁴

In Malaysia, it does not make any difference if a refused person presents himself to the immigration and declares that he wants to apply for asylum because there is no regulation or mechanism to deal with such a situation. He would be directed to approach the UNHCR office. Regardless of a person's claim about his persecution in his country of origin, he will be treated similarly like any other prohibited migrant. In this jurisdiction, persons denied entry will be deported and if deportation is not possible at that time, they will be detained until deportation can be arranged for them.⁶⁵ This treatment of refugees is in complete contradiction than the practice of other jurisdiction, which ratified the CRSR such as the United Kingdom, whereby a mechanism is available at the point of entry or borders to deal with persons applying for asylum.

3.4.4 Criminal Penalty

Conviction under section 5, 6, 8 or 9 of the Immigration Act will make a person liable to removal from Malaysia⁶⁶ and while waiting for the removal, a person may be detained in custody.⁶⁷ Regrettably, the onus of proof that a person does not contravene the provisions of section 6 and 8 lies with that person not the authority or prosecution.⁶⁸ This is contrary to the general principle of criminal law in proving one's guilt. Under the Malaysian Immigration

⁶⁴ *Mohd Iqbal A Rahman v Ketua Pengarah Imigresen & Ors* [2005] 1 CLJ 546.

⁶⁵ Immigration Act 1959/63 Immigration Act 1959/63, Section 31, 32 & 35.

⁶⁶ Immigration Act 1959/63, Section 32, 33.

⁶⁷ Immigration Act 1959/63, Section 34.

⁶⁸ Immigration Act 1959/63, Section 6 (4) and 8 (4).

Act 1959/63, all refugees and other types of illegal migrants are not distinguished between each other. Without valid documentation to remain and stay in Malaysia, illegal immigrants including refugees are subject to detention, deportation and whipping.⁶⁹ Before removal from Malaysia, the court can order a non- citizen to be detained. In the case of *Re Lang Za Thong; Ex P Jabatan Imigresen Malaysia* [2009] 1 CLJ 108, a Myanmar national is ordered to be detained for a period of two months for the purpose of effecting his deportation.

3.4.5 Inconsistency Of The Immigration Law With The Principle Of *Non- Refoulement* And The Best Interests Of The Child

In three significant aspects, Malaysian immigration law is inconsistent with refugee rights as recognised under the principle of NR and the BIC. First, it does not establish any means to screen refugee applicant or persons claiming to be asylum seekers causing them to be treated as illegal immigrant. Second, persons without legal travel document or valid permit of entry or to stay can be penalised and can be removed from Malaysian territory regardless of any justified reasons such as claim as refugee. Both situations may result in detention and deportation, which is contrary to the principle of NR. The third is the absence of BIC consideration in its provision. If it is not in the legal provision, then it will not be applied and implemented in practice. As such, the conduct of the immigration authority in relation to children will not be based on the principle of BIC. For example when a non- citizen who has family including young children in Malaysia is detained and ordered to be removed from the country, he would challenge the validity of the detention on various reason or claim that the authority has failed to consider the material facts in making the decision. However, he cannot

⁶⁹ Immigration Act 1959/63, Section 57.

rely on the principle of BIC to avoid the deportation such as applied in the UK courts⁷⁰ because BIC is not part of the immigration law.

The case of *Mohd Iqbal Abdul Rahman*⁷¹ is an example where the NR principle and the rule of BIC could have been applied. Mohd Iqbal was a terror suspect detained without trial for two years, from 22 August 2001 to 21 August 2003. He was originally from Indonesia and was a permanent resident in Malaysia, whose wife is a Malaysian citizen and has small children. He made an application of the writ of *habeas corpus* to demand his release from Kamunting

Detention Centre. The Director General of Immigration then declared him to be undesirable migrant under section 8 (3) (k) and prohibited migrant under section 14 (4) (b) of the Immigration Act 1959/63 for the purpose of deporting him to Indonesia. For this, he applied for the writ of *certiorari* to quash the declaration made by the Director General. Before his applications were heard in September 2004, he was deported and his permanent resident Status was revoked.

Mohd Iqbal was arrested and then deported during the height of arrest made by the Indonesian authority against terror suspects. The Bali Bombing and attack on Marriot Hotel in Jakarta are two of the incidents perpetrated by terrorists group, the *Jemaah Islamiyyah*.⁷² Malaysia's

⁷⁰ See discussion in Chapter 2.

⁷¹ [2005] 1 CLJ 546; [2005]3 CLJ 644; [2004] 1 LNS 585

⁷² Zachary Abuza, *The State of Jemaah Islamiya* (2004) 28 Fletcher F. World Aff. 93, 94.

move to detain and deport him is believed to be connected to the authority's effort to pre-empt terrorism. If the NR is applicable in the case, the court would have to consider whether his return to Indonesia will put him at risk of violation of human rights. As for the BIC principle, the fact that family life can be disrupted by the deportation and will affect the best interests of his small children should be a primary consideration. Sadly, there is no such provision to compel the judiciary to make such consideration. Without express authority in the Immigration Act or any other statute, the duty cannot be imposed.

In refugee situation, it is impossible to demand that each person escaping persecution to possess a valid travel document. As have been widely documented, many refugees leave their country in a rush or urgency, out of desperation and sometimes clandestinely to ensure their safety. As such, it shall be expected that those who cannot afford the regular travelling cost will choose alternative channels and even end up using the service of smugglers.⁷³ The use of illegal transportation as practiced by the boat people, where many Indonesians and Filipino refugees will consequently forcibly enter Malaysia through unauthorized points of entry in order to avoid the authority and escape detention.⁷⁴ Sometimes refugee comes from states where passport or travel documents are not issued except for certain ethnic groups.⁷⁵ This has

⁷³ W C Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books Ltd, London 2000) 28-29; and Rey Koslowski, "Economic Globalization, Human Smuggling, And Global Governance" in David Kyle & Rey Koslowski (eds), *Global Human Smuggling* (The John Hopkins University Press, Baltimore 2001) 349, cited in Mary A. Young, 'The Smuggling And Trafficking Of Refugees And Asylum Seekers: Is The International Community Neglecting The Duty To Protect The Persecuted In The Pursuit Of Combating Transnational Organized Crime?' (2004) 27 Suffolk Transnat'l L. Rev. 101, 114.

⁷⁴ W C Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books Ltd, London 2000) 23, -29.

⁷⁵ See for instance, the case of Rohingya refugees escaping Myanmar who have been denied citizenship by the Myanmar authority. As they are stateless, the Rohingyans are not granted passport or identity document similar to other Myanmar citizens. See a report submitted to the Committee on the Rights of the

made it almost impossible for them to possess valid travel document and even if they do have it, it could have been altered and even forged to disguise their identity out of fear; or to ease their escape. These conditions make them highly vulnerable to criminal penalty under section 5, 6 and 8 of the Immigration Act 1959/63 and thus causing their agony to intensify.

In addition to the above difficult circumstances, the Act also gives discretionary power to the Director General. In exercising and discharging the duties vested in the Director General under the Act, the Director General and the immigration officers have the discretion to refrain and prohibit a person from entering Malaysia or to cancel any pass or permit of entry.⁷⁶ This can be done in the interest of public security, or for economic, industrial, social, educational and other conditions in Malaysia.⁷⁷ Section 9 and 9A gives the Director General an unlimited and unguided discretionary power, which is extremely exposed to mistake, error, abuse and misuse. As a result, refugees with valid travel document can be effortlessly denied entry for almost any reason.

Furthermore, this also means that in anticipation that people from specific country escaping persecution or for any other causes are likely to migrate to Malaysia, the Director General may issue the prohibition to curb any possible influx of refugees. The condition is further

Child: The Arakan Project, 'Issues to be raised to the Committee on the Rights of the Child' (2012) <http://www.oxfordburmaalliance.org/uploads/9/1/8/4/9184764/arakan_project_report_2012.pdf> accessed 15 June 2012.

⁷⁶ Immigration Act 1959/63, Section 9 & 9A.

⁷⁷ Immigration Act 1959/63, Section 9 & 9A.

exacerbated by section 59⁷⁸ and 59A⁷⁹ that exclude the right to be heard and the right to judicial review to a certain extent. In administrative law, denial of the right to be heard is a breach of natural justice and is a ground for judicial review.⁸⁰ By invoking section 59, the decision maker is free to decide on any issue or question without having to hear from those who might be aggrieved or affected by the decision and under section 59A, obviously an ouster clause, one can only challenge the way in which a decision is made but not the merit of a decision or the conclusion of the decision making process.⁸¹ Nevertheless, the wording of section 59A signifies that if it can be proved that the principle of the BIC is a customary international law that binds Malaysia, any omission to adopt the principle amounts to a violation of the procedure, and thus, falls under the ambit of that section.

Constraint and limitation set via section 59 and 59A undoubtedly denied those aggrieved by the decision the right to redress and when it comes to refugees, it is a shield so thick they

⁷⁸ Section 59, Immigration Act 1959/63,
 “No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of East Malaysian State, the State Authority, make any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act”.

⁷⁹ For full provisions refer to Appendix. Section 59A, Immigration Act 1959/63:
 “(1) There shall be no judicial review of any act done or any decision made by the Minister or the Director General, or in the case of East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision. (2) In this section “judicial review” includes proceedings instituted by way of- (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari; (b) an application for a declaration or an injunction; (c) any writ of habeas corpus; or (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, , or in the case of East Malaysian State, the State Authority by any provisions of this Act.

⁸⁰ HWR Wade, *Administrative Law* (Sweet & Maxwell , London 1982) at p 413.

⁸¹ Judicial review is a process whereby decision and determination by an inferior court/ tribunal/ decision maker is challenged in a superior court for the purpose of quashing it. While it is viewed that an administrative body may limit judicial review, there is a possibility that the ouster clause can be removed See Jayanthi Naidu,” The Rise and Rise of Administrative Finality” (2004) 2 MLJ lxxii & (2004) 2 MLJA 72.

cannot break through it. As can be seen in its provisions, the Immigration Act 1959/63 is only concerned with the sovereignty, security and interest of the country. It is not in any way meant to protect the rights of immigrants, refugees and refugee children.

Nevertheless, the Immigration Act 1959/63 contains provisions that can be used to boost refugee protection. Under section 55 of the Immigration Act, the Director General has the discretionary power to exempt a person or a group of persons from any or all provisions of the Act.⁸² No guideline accompanies the exercise of power. This is where many believe that the refugee problem with the immigration authority can be rectified to a certain extent. It has been suggested that in the light of providing initial protection for refugees, they should be exempted from the incriminating provisions of the Act, which are contrary to the basic rights of refugees or asylum seekers.⁸³

The Director General can exercise his power under section 55 for the benefit of asylum seekers and refugees since he has the discretionary power to exempt a person or a group of persons from any or all provisions of the Act. The exemption of asylum seekers and refugees from section 5, 6 and 8 will make them impervious against criminal charge for entry at unauthorized point, and entry without valid permit/ pass/ travel document. or entry as prohibited migrant. Exemption from section 59 and 59A will allow asylum seekers to appeal the decision of the Director General.

⁸² Malaysian Immigration Act 1959/63 Immigration Act 1959/63. For full provisions refer to Appendix.

⁸³ Arshad, A H, "The Protection of Refugee Children in Malaysia: Wishful Thinking or Reality" (2004) 34 (4) INSAF 105.

3.5 HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

The Human Rights Commission of Malaysia (SUHAKAM), a national human rights institution was established under the Human Rights Commission of Malaysia Act 1999 (SUHAKAM Act) as a result of Malaysia's involvement in the United Nations Commission on Human Rights⁸⁴ and the influence of the Principles Relating to the Status of National Institutions (The Paris Principles). Its primary role and function promotional, educative, advisory and investigative in nature.⁸⁵ To enable SUHAKAM to carry out these functions, the institution is accorded with the power to conduct research activities, advise any government body of any complaint made in order to take appropriate measure, to investigate infringement of human rights, to visit places of detention, to make statement on human rights and other activities necessary in accordance with law.⁸⁶ In addition to that, SUHAKAM shall have regard to the UDHR in fulfilling its duties under the Act so long as it is not inconsistent with the Federal Constitution.⁸⁷ SUHAKAM is not empowered with real authority and it cannot

⁸⁴ The history of its inception is published on its website. See SUHAKAM, 'History' <<http://www.suhakam.org.my/info/profil>> accessed 20 May 2013

⁸⁵ SUHAKAM Act 1999, Section 4 (1):

- a) *to promote awareness of and provide education in relation to human rights;*
- b) *to advise and assist Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;*
- c) *to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and*
- d) *to inquire into complaints regarding infringements of human rights referred to in section 12."*

⁸⁶ SUHAKAM Act 1999, Section 4(2)

- (a) to promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;
- (b) to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken;
- (c) to study and verify any infringement of human rights in accordance with the provisions of this Act;
- (d) to visit places of detention in accordance with procedures as prescribed by the laws relating to places of detention and to make necessary recommendations;
- (e) to issue public statements on human rights as and when necessary; and
- (f) to undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities."

⁸⁷ SUHAKAM Act, Section 4(4)

adjudicate and grant remedy for human rights infringement. Many are of the view that SUHAKAM is a toothless tiger and thus cannot become an effective human rights defender.⁸⁸

SUHAKAM admitted that refugee children are the most affected group of children since they have limited access to school or education⁸⁹ and it makes several recommendations to the authority to improve the situation.⁹⁰ The most valuable work of the Commission is its contribution to persuade the government agencies involved in dealing with refugees to provide the refugees with assistance and to respect the UNHCR identity card. Suhakam's concern on and effort for refugee children are also demonstrated in the following actions:

1. Roundtable Discussion on Asylum Seekers in Malaysia.⁹¹
2. Visits to the immigration detention depot followed by recommendations for improvement.⁹²
3. Recommendation to the government the ratification of the ICCPR, ICESCR and CAT;⁹³ and accession to the CRSR.⁹⁴

⁸⁸ Li-Ann Thio, 'Panacea, Placebo or Pawn? The Teething problems of the Human Rights Commission of Malaysia (SUHAKAM) (2008) 40 Geo. Wash. Int'l L. Rev. 1271- 1342; *Suhakam wants more bite*, STAR ONLINE (Malay.), July 20, 2008, <http://thestar.com.my/news/story.asp?file=/2008/7/30/nation/21953900&sec=nation>; and Yusof Ghani, *Show your Teeth, AIM (Abolish ISA Movement) tells Suhakam*, **MALAYSIAKINI**, Apr. 10, 2003, <http://www.malaysiakini.com/news/15129>. Despite its existence for almost 15 years, Suhakam's work has no significant impact to the public. Even though it has been consistent in providing reports including public inquiry report to the government, they were not gracefully accepted and sometimes bombarded with accusations and harsh critics including being labelled as full of "Western thinking" for applying Western standard to local situation. See for instance Amanda Whiting, 'Situating Suhakam: Human Rights Debates And Malaysia's National Human Rights Commission' (2003) 39 Stan. J. Int'l L. 59, 83-88.

⁸⁹ Suhakam, Annual Report 2009 (Suhakam, Kuala Lumpur 2010) p. 204.

⁹⁰ Suhakam, Annual Report 2013 (Suhakam, Kuala Lumpur 2014) p. 87, 89; and Suhakam, Annual Report 2012 (Suhakam, Kuala Lumpur 2013) p. 18, 53,76.

⁹¹ Suhakam, Annual Report 2004 (Suhakam, Kuala Lumpur 2005) p. 56-9. A Roundtable Discussion on developing a Comprehensive Policy Framework for Refugees and Asylum Seekers' was held in 2009. See Suhakam, Annual Report 2009 (Suhakam, Kuala Lumpur 2010) p. 185.

⁹² Suhakam, Annual Report 2005 (Suhakam, Kuala Lumpur 2006) p. 71-3; Suhakam, Annual Report 2006 (Suhakam, Kuala Lumpur 2007) p.81-4.

⁹³ Suhakam, Annual Report 2005 (Suhakam, Kuala Lumpur 2006) p. 111.

⁹⁴ Suhakam, Annual Report 2013 (Suhakam, Kuala Lumpur 2014) p. 158.

4. Response to numerous complaints on migrants in Sabah particularly the Filipino refugees by conducting roundtable discussion, field visit to refugee settlement sites and holding dialogue with local people.⁹⁵
5. Receipts and investigation of complaints from refugees and asylum seekers.⁹⁶
6. Research on right to education of vulnerable children including refugees and asylum seeking children and make recommendations to improve the access.⁹⁷
7. Workshop for People's Volunteer Corps (RELA) to help them understand human rights including the rights of immigrants and refugees.⁹⁸
8. Closed- door discussion and annual consultation on refugee issues with UNHCR.⁹⁹
9. Report on refugee issues in its annual report.¹⁰⁰
10. Press statement to voice its concern on refugee issues including the welfare of children.¹⁰¹

⁹⁵ Suhakam, Annual Report 2006 (Suhakam, Kuala Lumpur 2007) p. 53-8.

⁹⁶ Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p.7. Suhakam received 13 complaints from refugees in 2007 (Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p. 64); 14 complaints in 2008 (Suhakam, Annual Report 2008 (Suhakam, Kuala Lumpur 2009) p. 36; 30 complaints in 2010 (Suhakam, Annual Report 2010 (Suhakam, Kuala Lumpur 2011) p. 36; 65 in 2011 (Suhakam, Annual Report 2011 (Suhakam, Kuala Lumpur 2012) p. 56; 50 in 2012 (Suhakam, Annual Report 2012 (Suhakam, Kuala Lumpur 2013) p. 54; and 25 in 2013 (Suhakam, Annual Report 2013 (Suhakam, Kuala Lumpur 2014) p. 43. Among issues of complaints are denial of access to healthcare and education; detention; problems with application to the UNHCR; and selection to be resettled. See for instance, Suhakam, Annual Report 2009 (Suhakam, Kuala Lumpur 2010) p. 35; Suhakam, Annual Report 2011 (Suhakam, Kuala Lumpur 2012) p. 51; and Suhakam, Annual Report 2013 (Suhakam, Kuala Lumpur 2014) p. 46.

⁹⁷ Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p. 48- 52; Suhakam, Annual Report 2008 (Suhakam, Kuala Lumpur 2009) p. 179. The recommendations includes urging the government to set up a screening facilities to identify refugees; develop a framework to protect refugees; improve cooperation with the UNHCR; and to allow access to refugees and asylum seekers in detention.

⁹⁸ Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p. 57-60

⁹⁹ Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p. 76; Suhakam, Annual Report 2008 (Suhakam, Kuala Lumpur 2009) p. 186; Discussion with the Director General of the Immigration Department was also held as in Suhakam, Annual Report 2009 (Suhakam, Kuala Lumpur 2010) p. 36.

¹⁰⁰ Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p. 104-8.

¹⁰¹ Suhakam, Annual Report 2007 (Suhakam, Kuala Lumpur 2008) p. 181.

3.6 MALAYSIA'S PERSPECTIVE OF THE 1951 CONVENTION RELATING TO STATUS OF REFUGEES AND ITS 1967 PROTOCOL

Although the concept of burden sharing in refugee protection is a familiar notion to Malaysia, the country will always bear in mind its two most extraordinary experience of refugee hosting. The first is the strain of hosting the mass influx of refugees during the Indochinese upheaval¹⁰² beginning from the 1970s until end of 1990s and the fear of residual problems related to it.¹⁰³ Secondly is the inundated flow of Filipino refugees in Borneo and the tensions that built up at some stage between the state government of Sabah and the federal government in dealing with the Filipinos.¹⁰⁴ Both prolonged refugee episodes were met with various unconstructive reactions from the local people.¹⁰⁵ These corollaries are purportedly being used by the authority to justify the resistance against any call for Malaysia to ratify the 1951 Convention Relating to the Status of Refugee and its 1967 Protocol.¹⁰⁶ Diverse grounds are being employed by the government to substantiate Malaysia's refusal to recognise refugees or to codify national laws on refugees. Firstly, to Malaysia, the recognition of refugees will be

¹⁰² Graeme Hugo, 'Postwar Refugee Migration in Southeast Asia: Patterns, Problems and Policy' in John R. Rogge (Ed), *Refugee A Third World Dilemma* (Rowman& Littlefield Publisher, USA 1987) 242, 246.

¹⁰³ Astri Suhrke, 'Indochinese Refugees: The Law and Politics of First Asylum'(1983) *ANNALS AAPSS* 102- 115, 102.

¹⁰⁴ Filipino refugee issue is a prolonged problem still grappling both the state of Sabah and the Federal Government. See Joseph Pairin Kitingan, 'Speech of Datuk Seri Panglima Joseph Pairin Kitingan, President of Parti Bersatu Sabah (PBS) (22nd PBS Congres, 11 Nov 2007) in Hongkod Koisaan Penampang, Sabah http://www.pbs-sabah.org/pbs3/html/Congress2007/ucapan_dasar_2007.html accessed 26 May 2009.

¹⁰⁵ Local people living in the east coast where the boat people landed and stayed in refugee camps showed considerable resentment towards refugees. See Graeme Hugo, 'Postwar Refugee Migration in Southeast Asia: Patterns, Problems and Policy' in John R. Rogge (Ed), *Refugee A Third World Dilemma* (Rowman& Littlefield Publisher, USA 1987) 246.

¹⁰⁶ In addition to that, the government has also neglected the recommendation of the National Human Rights Commission (SUHAKAM) to ratify principal human rights treaties; the 1966 International Covenant on Civil and Political Rights (ICCPR), 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT) and 1966 International Covenant on Economic, Social and Cultural Rights (ICESR) and the two optional protocols to the Convention on the Rights of a Child (CRC). See SUHAKAM, *2005 Annual Report* (SUHAKAM, Kuala Lumpur 2006) 110. In fact the government has been non- responsive to SUHAKAM's recommendation. See SUHAKAM, 'Report To The 14th Annual Meeting Of The Asia Pacific Forum Of National Human Rights Institutions' (Amman, Jordan, 3-6 Aug 2009) 8.

perceived as meddling with domestic tribulation of its neighbouring countries, which is in contrast to the ASEAN stand.¹⁰⁷ Next, Malaysia views the Convention as ‘Eurocentric’; has no regards for developing countries and their particular experience in the region; contrary to Asian values; and entails a huge financial implication.¹⁰⁸

In addition to that Malaysia is also concerned that ratification of the CRSR will be taken by the public as an indication that Malaysia is open and ready to accept refugees and will consequently attract more refugees and illegal migrants to the country. Such opening of a floodgate is totally undesirable.¹⁰⁹ Then, there is also considerable trepidation that more illegal immigrants will take advantage of the refugee status claim and the possibility of causing massive influx in the country.¹¹⁰ The on-going problem of fake UNHCR identification papers and IMM13 pass only adds to the apprehension of bogus claims and the anticipated abuse of the refugee system if it were to be materialised.¹¹¹ The last reason put

¹⁰⁷ Minister in the Prime Minister’s Department, Datuk Seri Dr. Rais Yatim remarked when responding to UNHCR’s call for Malaysia to accept and admit asylum seekers and refugees by adopting a national legal framework. He even asserted that it is not Malaysia’s duty to figure out the persecution faced by refugees in their country of origin. See ___ ‘Rais: We Have No Intention to Codify Laws on Refugees, Asylum Seekers’ *New Straits Times* (Kuala Lumpur, 25 Oct 2003) 3.

¹⁰⁸ Sara E. Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinuss Nijhoff Publisher, Leiden 2008) 6- 15.

¹⁰⁹ The then Foreign Minister in his statement to the press stressed that refugees are not recognised in the country but Malaysia have done so much to assist them. See SHM SNS RS, ‘Pelarian Tidak Diiktiraf Tetapi Tetap Dibantu’ *Berita Harian* (Kuala Lumpur, 2 July 2007) 16; __, ‘Syed Hamid: We Won’t Recognise Refugees’ *New Straits Times* (Kuala Lumpur, 9 March 2007) 8; and ___ ‘Najib Disputes Refugee Report on Malaysia’ *New Straits Times* (Kuala Lumpur, 21 June 2008) 2.

¹¹⁰ This is openly stated in the Malaysia National Security Council website. See National Security Council, ‘Refugee’ (*National Security Council*, May 2009) < http://www.mkn.gov.my/v1/index.php/en/mkn-focus/focus_transnational-security> accessed 15 March 2010.

¹¹¹ Bernama, ‘UNHCR ‘Aware and Concerned’ About Fake Paper’ *Daily Express News* (Kota Kinabalu, 5 March 2005) <<http://www.dailyexpress.com.my/news.cfm?NewsID=32969>> accessed 1 Nov 2010; ___ ‘Fake IMM13 Refugee Document Seized’ *Daily Express News* (Kota Kinabalu, 3 Oktober 2003) < <http://www.dailyexpress.com.my/news.cfm?NewsID=22003>> accessed 1 Nov 2010; and ___ ‘Fake UN, Aceh ID Cards Sold to Illegals’ *The Star Online* (Kuala Lumpur, 6 March 2008) <<http://thestar.com.my/news/story.asp?file=/2008/3/6/nation/20553830&sec=nation>> accessed 24 Sept

forth by the government is that Malaysia is not in a position to tolerate the conciliation between its sovereignty, security, culture and policies to improving human rights protection¹¹² despite being fully aware of the negative consequences of neglecting refugee children.¹¹³ Malaysia's stand about international refugee laws and UNHCR as the supervisory body is indicated through several statements made by members of the cabinet who asserted that the role of UNHCR was irrelevant to Malaysia and thus refused to recognize UNHCR's powers and mandate. This part focuses on how Malaysia perceive the refugee convention as reflected in statements, speeches and press releases in order to understand the reason for Malaysia not ratifying the convention.

By ratifying the Convention the government is concerned that it might in fact be opening the floodgates; prompting more refugees to come to Malaysia¹¹⁴. By becoming a party, Malaysian is bound to apply the provisions of the CRSR, which are very protective and supportive of refugees. More refugee flow is anticipated to arrive in Malaysia as they are expecting better opportunities, protection and entitlements. Even without explicit refugee legislation Malaysia is host to approximately 155,000 refugees and asylum seekers. Surrounded by a number of

2009. In 2007, six Myanmarese and two locals were arrested and charged with possession of forged documents. They are believed to be part of a syndicate which supply fake government documents including UNHCR cards to illegals. See Lourdes Charles, 'Forgery Ring Busted' *The Star Online* (Kuala Lumpur, 18 Aug 2007) <<http://thestar.com.my/news/story.asp?file=/2007/8/18/nation/1862637&sec=nation>> accessed 24 Sept 2009.

¹¹² Haz Haz Zub Mo, 'Malaysia Not Planning to Join UN Convention on Refugees' *New Straits Times* (Kuala Lumpur, 17 Apr 2007) 8

¹¹³ V. Vasudevan, 'Refugees 'a Perennial Problem for Malaysia'', *New Straits Times* (Kuala Lumpur, 18 Apr 2007) 6. Several NGOs together with SUHAKAM constantly send reports, recommendation and petition to the government regarding the poor condition of refugees and refugee children in Malaysia that need urgent attention from the authority.

¹¹⁴ Haz Haz Zub, "Malaysia Not Planning to Join Un Convention on Refugees" (*New Straits Times*) 17 Apr 2007.

refugee producing neighbouring countries; Indonesia, Cambodia, Vietnam, Myanmar and Philippines, Malaysia continues to draw more refugees each year.

An analogy by Teitelbaum offers a good explanation of this. He equates refugee assistance and care to insurance whose function is to cover risk. However, insurance will encourage more risk taking including the unhealthy risk and ill-advised action. By providing refugees with camps to shelter, food supplies and medical care, the international community is actually encouraging refugees to leave their homeland in search of a more prosperous life. According to Teitelbaum, the promise of refugee status determination itself could incite and motivate would be refugees to come to certain destinations¹¹⁵. Refugees are willing to take the risk in return for a more promising future.

The convention and its contents are perceived as threats to Malaysia's sovereignty because the government is expected to bow to its requirements as opposed to local laws because some of the provisions are in conflict with the domestic law for example the prohibition of return in Article 33 of the CRSR which is contrary to the provisions section 5 and 6 of the Immigration Act 1959/63 as discussed earlier. This is also the perception shared by many countries¹¹⁶. The financial implication of the Convention requirements is huge and the Malaysia economy is unable to take in incredible expenses forecasted in setting up and implementing the framework and structure for refugee protection.

¹¹⁵ Michael S. Teitelbaum, 'Tragic Choices in Refugee Policy' in J.M. Kitagawa (ed), *American Refugee Policy* (Winston Press, Minneapolis 1985).

¹¹⁶ Catherine Dauvergne, 'Challenges to Sovereignty: Migration laws for the 21st Century', Research Paper No. 92 in *New Issues in Refugee Research* (UNHCR, Switzerland 2003).

The government believes that ratification of the Convention is not a national aspiration¹¹⁷ and contrary to the national interest. As a developing country Malaysia is more interested in investing for its own citizens rather than spending money on refugees. Previously in 1970 clashes erupted between local people and refugees from Indochina who arrived in boats. The refugees were blamed for causing soaring price rise of groceries and the government was accused of providing more for refugees than its own people.¹¹⁸

The benefits of being a state party to the convention are enormous though it cannot be directly assessed. However, as proved in many contracting states, by applying the same law and protection for all refugees, the state will avoid discrimination against refugees and double standard policies as demonstrated in previous refugee occasions; the Indochinese refugees and Filipino refugees. By recognising the rights of refugees such as the right to education, it may prevent direct consequences of not giving children their basic education such as illiteracy and other social problems. Education has always been considered as a factor to guarantee the social stability of a community.

Practices that are inconsistent with the provisions of the Convention such as detention and imprisonment will not serve any purpose for Malaysia. The refugees cannot be easily sent

¹¹⁷ V. Vasudevan, Refugees a Perennial Problem for Malaysia, (New Straits Times) 18 Apr 2007.

¹¹⁸ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) Refugees: A Third World Dilemma (Rowman & Littlefield, 1987) p. 259.

back and they may remain in detention centre for longer, placing more financial burden on the authorities especially relating to infrastructure and resources. If the refugees are to be deported, Malaysia is actually contributing to human trafficking and smuggling since traffickers are known to take advantage of refugee deportations. Since Malaysia's economy relies so much on migrant workers, the country should utilise the working age refugees by letting them to join the local work force. This will make it more reasonable for the government to combat economic migrants.

3.7 THE UNCRC AND PROTECTION OF REFUGEE CHILDREN IN MALAYSIA.

Malaysia became a party to the UNCRC in 1995, approximately 5 years after it came into force. When it initially ratified the Convention, Malaysia made reservations to 12 articles: Article 1 (Definition of a Child), 2 (Non-Discrimination), 7 (Birth Registration, Name and Nationality), 13 (Freedom of Expression), 14 (Freedom of Thought, Conscience and Religion), 15 (Freedom of Association and Peaceful Assembly), 22 (Rights of Children Seeking Asylum and Refugee Children), 28 (Right to Education) para. (1) (a) (b) (c) (d) (e), 28 para (2) & (3), 37 (Protection from Torture, Capital Punishment and Unlawful Arrest), 40 (Treatment of a Child Accused of a Crime) para (3) & (4), 44 (Duty of State to Report) and 45 (Effective Implementation and International Cooperation).¹¹⁹ Later, in March 1999, Malaysia withdrew some of them; Article 22, 28 (1) (b) (c) (d) (e), 28 (2) (3), 40 para (3) & (4), 44 and 45.¹²⁰ Malaysia maintains its reservation of the UNCRC of articles on non-discrimination,

¹¹⁹ Office of the United Nations High Commissioner for Human Rights, Status of Ratification Declaration and Reservation (United Nation Convention on the Rights of the Child) <<http://www2.ohchr.org/english/bodies/ratification/11.htm>> accessed 12 Nov 2008.

¹²⁰ Office of the United Nations High Commissioner for Human Rights, 'Status of Ratification Declaration and Reservation' (United Nation Convention on the Rights of the Child) <<http://www2.ohchr.org/english/bodies/ratification/11.htm>> accessed 12 Nov 2008

birth registration, name and nationality, freedom of expression, freedom of thought, conscience and religion and freedom of association and peaceful assembly since 1995. This is because the provisions are inconsistent with the Federal Constitution. This Convention and its fundamental guiding principles in Articles 2, 3, 6 and 12 is one of the only two¹²¹ IHRL treaties ratified by Malaysia of all the human rights treaties adopted by the UN. Established as a subject of rights under the CRC,¹²² it is sad that children in a refugee situation in Malaysia are unable to exercise and enjoy their rights.

In its Concluding Observation¹²³ on the report submitted by Malaysian government, the Committee on the Rights of the Child, a monitoring mechanism established under the Convention stated that the delay of submitting the reports and its contents demonstrated the government's lack of real commitment to implement the UNCRC.¹²⁴ It considered that Malaysia is moving towards full implementation at a slow pace.¹²⁵ This observation is justified as Malaysia has only incorporated a few principles of the UNCRC in its legislation.¹²⁶ The Committee recommends the authority to expedite the review on its reservation of UNCRC provisions¹²⁷ and to continue to prioritize budgetary allocations for the realization of children's rights to the maximum extent of available resources for social and

¹²¹ The other human rights treaty to which Malaysia is a state party is the UN Convention on the Elimination of Discrimination Against Women 1979 (CEDAW).

¹²² Jean Zermatten, "The BICLital Analysis, Function and Implementation" Working Report, Institut International Des Droit De Lenfant" (2010) 2.

¹²³ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1.

¹²⁴ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1, 20.

¹²⁵ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1, 20.

¹²⁶ Refer to discussion in 3.3.1.

¹²⁷ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1, 3.

health services, education and child protection and to allocate more resources for the implementation of special protection measures for vulnerable groups of children. The Committee also recommends that Malaysia strengthen its efforts to disseminate the UNCRC to children, their parents and the broader public, including appropriate material specifically for children translated into the different languages spoken in Malaysia, including those spoken by migrant children, asylum-seeking and refugee children and indigenous children.¹²⁸

It also recommends Malaysia to take all necessary measures to harmonize the definition of the child, including the terminology used, in the national laws so as to eliminate inconsistencies and contradictions. It further recommends Malaysia to raise the standard of living among its population living in poverty and enhance the capacity to develop and monitor poverty-reduction strategies at all levels, and ensure that children living in low-income households have access to social and health services, education and adequate housing¹²⁹ Most importantly, in relation to refugee and asylum seekers, the Committee is particularly concerned that the implementation of the current provisions of the Immigration Act 1959/63 (Act 155) has resulted in detaining asylum-seeking and refugee children and their families at immigration detention centres, prosecuting them for immigration-related offences, and subsequently imprisoning and/or deporting them. Therefore, the Committee recommends that Malaysia should take into account the Committee's General Comment No. 6 (2005) On The Treatment Of Unaccompanied And Separated Children Outside Their Country Of Origin or (CRC/GC/2005/6) and develop a legislative framework for the protection of asylum-seeking

¹²⁸ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1, 6.

¹²⁹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1, 7.

and refugee children, particularly unaccompanied children, in line with international standards.¹³⁰

In response¹³¹ to the list of issues relating to asylum seeking and refugee children put forth by the Committee in their concluding observation, the Malaysian government bluntly informed that the statistical data on unaccompanied asylum seeking and refugee children and information on the situation of refugee and asylum seeking children and Malaysian laws, policies and programmes related to these children are not available.¹³² Such an attitude is a reflection of how lightly asylum seeking and refugee children are being taken by the government. This is also an epitome of interest that the government have in the issue surrounding refugee children and their protection. The authority's decision of not keeping any record of statistical data and the situation of refugee reflect its lack of commitment to improve the situation of refugee.

As shown in Chapter 2, the application of the principles of UNCRC especially Article 3 and 22 can enhance the protection of refugee children. In the Malaysian context, while waiting for the UNCRC to become law in the jurisdiction in its full form, the timeframe of which cannot be ascertained, arrangements need to be worked out to provide specific protection for refugee

¹³⁰ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Malaysia*, 25 June 2007. CRC/C/MYS/CO/1, 12.

¹³¹ CRC, "Written Replies By The Government Of Malaysia Concerning The List Of Issues (CRC/C/MYS/Q/1) Received By The Committee On The Rights Of The Child Relating To The Consideration Of The Initial Report Of Malaysia" CRC/C/MYS/Q/1/Add.1, 4 Dec 2006

¹³² CRC, "Written Replies By The Government Of Malaysia Concerning The List Of Issues (CRC/C/MYS/Q/1) Received By The Committee On The Rights Of The Child Relating To The Consideration Of The Initial Report Of Malaysia" CRC/C/MYS/Q/1/Add.1, 4 Dec 2006, 27, 30.

children expeditiously; otherwise, their suffering and the disruption to their development will be prolonged. This protection is very urgent because their vulnerability and dependency can cause them to be exposed to unnecessary risk that can affect their development. Their development, as the Committee on the Rights of the Child put it, proceeds in sequence, similar to a tower of bricks. As each layer depends on the layer below it, any delays and interruption to the sequence may severely disrupt development.¹³³

All this while, Malaysia has been justifying its refusal to ratify the CRSR or allow refugees to integrate locally by frequently referring to its sovereignty and security issues. Never once have children and their best interests been at the centre of the discussion or basis of decision either in the making of policy such as allowing refugees to access public hospital with 50% discount,¹³⁴ or in the arrangement with the UNHCR. In Malaysia, the employment (if any) of the BIC principle for refugees is exercised by the UNHCR office in Kuala Lumpur when dealing with claims of refugee status, identification of durable solutions and the implementation of solutions.¹³⁵ The Malaysian authority, however, is not known to have employed the principle to deal with refugee children, and it often claims that its positive actions towards refugee children are merely “humanitarian gestures”. The immigration legislation discussed earlier in 3.4 makes no reference to the best interests rule. Moreover, the courts, in deciding immigration-related cases, have never touched on the matter even when

¹³³ UNHCR, *Refugee Children: Guidelines on Protection and Care*.

¹³⁴ Surat Pekeliling Bahagian Kewangan Bilangan 1 Tahun 2006 Caj Rawatan Perubatan Bagi Pelarian Yang Berdaftar Secara Sah Dengan Pesuruhjaya Tinggi Bangsa-Bangsa Bersatu Bagi Hal Ehwal Pelarian (United Nations High Commissioner For Refugees- UNHCR), para. 4,5.

¹³⁵ UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva 2008) 5. It was stated that a pilot project in implementing the Guidelines was conducted in Malaysia.

the person charged with an immigration offence is a child.¹³⁶ Thus, it is clear that the rule is not applied in immigration matters in Malaysia even though it is a requirement under the Child Act 2001, which expects the Court for Children to make the principle of BIC its primary consideration in making orders and meting out sentences.¹³⁷ This study anticipates that the rule will be applied by the immigration and related authorities when dealing with refugee children, as this are expected to have a positive impact on the treatment and handling of refugee children.

The principle of the BIC should be used as a framework to protect refugee children in Malaysia for three reasons. First, the absence of an express law to protect refugees has resulted in inconsistent treatment.¹³⁸ The fact that the Malaysian authority has made no plan to devise a formal protection regime gives rise to the need to adopt a principle that could reasonably govern the conduct of the authority in handling and dealing with refugee and asylum-seeking children. The principle in question must be a basic norm that has been widely applied in matters involving children. The principle of the BIC fits the description as it does not impose specific and rigid procedures; instead, it allows the authority to exercise a certain degree of discretion while maintaining some consistency. For instance, the authority is required to consistently make the BIC a primary consideration but it is not bound to decide in the best interests of the child.

¹³⁶ *Iskandar Abdul Hamid v PP* (2005) 6 CLJ 505. Further discussion in Chapter 3.

¹³⁷ Child Act 2001, Section 30 (5).

¹³⁸ Cross-refer to discussion in Chapters 3 and 4.

Second, for the purpose of protecting the wellbeing of children. Forced displacement is a threat to the wellbeing of children, including their mental health and physical development. The wellbeing of their mental health and physical development must be safeguarded as it is in their best interests. Therefore, it is important to ensure that their health is not neglected and they do not suffer further detriment. Without a governing principle, such as the BIC, the authority may take actions or decisions, purposely or out of ignorance, that adversely affect refugee children.

Lastly, to protect refugee children from becoming victims of organized and cross border crimes. Refugee children are at risk of becoming victims of human trafficking and exploitation. These risks are present because there is no law to protect them; there is no mechanism in place to formally protect them, and the conduct of the authorities in the deportation and removal of migrants can expose refugee children to inhumane treatment and the worst form of human rights violations. The principle of the BIC will ensure that displaced children are treated as children, not as objects or commodities or as criminals. The application of the principle will compel the authority to carefully consider its conduct at all times.

3.8 MALAYSIA'S MEMBERSHIP IN THE AALCO AND ITS PLEDGE UNDER THE BANGKOK PRINCIPLES

In 1970 Malaysia became a member of the Asian-Africa Legal Consultative Organisation (AALCO)¹³⁹ whose primary objective among others is to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern.¹⁴⁰ As refugee is a common problem to many of its member states, in 2001 the organisation adopted the Bangkok Principles On Status and Treatment of Refugees (Bangkok Principles), a non-binding instrument. This document is merely a soft law, which has no legal effect but meant to guide state members in providing protection to refugees. The Bangkok Principles is part of the regional initiatives taken to provide refugees who are present in the territory of member states with standard treatment.¹⁴¹

Despite its non-binding status, the Bangkok Principles has widened the ground of refugee persecution to include colour, ethnic origin and gender¹⁴² while recognising every person who is compelled to leave his country of nationality or place of habitual residence and to seek refuge in another place due to external aggression, occupation, foreign domination or events

¹³⁹ AALCO was formerly known as Asian Africa Legal Consultative Committee and has 47 countries as its members. Its main objective is to function as advisory body to the members states on matters pertaining to International Law and as a platform for cooperation in common legal concern. As a consultative body, it will among others consider and deliberate on issues related to international law, make recommendations, exchange views, experiences and information on matters of common interest.

¹⁴⁰ Statute of AALCO, Article 1 (a), (b).

¹⁴¹ Pia Oberoi, 'Regional Initiatives on Refugee Protection in South Asia' (1999) 11 IJRL. 193, 195.

¹⁴² Article 1 of Bangkok Principles defines refugee as follows: "*a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group, leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or, being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection*"

seriously disturbing public order as refugees.¹⁴³ It also recognised lawful dependants of refugees as refugees as well.¹⁴⁴ Other provisions of the Bangkok Principles are a combination of the provisions of CRSR; the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; and the 1984 Cartagena Declaration on Refugees.

Supported by its member states the adoption of the Bangkok principles however has not influenced the law and practice of the nations in Asia including Malaysia even though it was claimed that it reflected the practice followed by states in dealing with refugees.¹⁴⁵ Malaysian practice after 2001 does not reflect full compliance to the Bangkok Principles. In fact, there is no mechanism established to monitor the implementation of the Bangkok Principles by member states. The organization however, takes some effort to discuss refugee matters but not extensively. For instance suggesting state members to increase the cooperation in responding to refugee problem and to avoid double standard in the treatment of refugees.¹⁴⁶ If Malaysia is to follow the Bangkok Principles and to honour the pledge it should therefore accept refugees that fall within the definition to its territory and treat them as suggested by the Bangkok Principles. The government made no reference to the Bangkok Principles in relation to Malaysia's obligation and practice regarding refugees. The adoption itself demonstrates states awareness of their obligation to refugees but it is not fully reflected in state practice.

¹⁴³ Bangkok Principles, Article 1 (2)

¹⁴⁴ Bangkok Principles, Article 1 (4)

¹⁴⁵ AALCO, The status and Treatment of Refugees AALCO/44/NAIROBI/2005/SD/S 3, para. 1

¹⁴⁶ AALCO, Summary Report Of The Fifty- Third Annual Session Of The Asian-Africa Legal Consultative Organisation (5- 18 Sept. 2014, Tehran) p. 12-15.

3.9 LEGAL STATUS OF REFUGEE CHILDREN AND GAP OF PROTECTION

Two important issues are apparent from the discussion above. Firstly, the legal position of refugee children in Malaysia is very clear: they are considered illegal immigrant if they have no permission to stay or have no legal travel document. Reliance on Child Act 2001 to protect refugees and guarantee their rights also failed as the Act does not address refugee children in its provisions and is silent regarding any substantive rights of children even though it is claimed that the Act was enacted in the spirit of the UNCRC. Constant refusal of Malaysian authorities to use the term refugee or to label refugees as refugees or to include refugee in the legislation is not peculiar. Malaysia's rejection can be explained from two points of view; first it does not want 'refugees' to have a solid legal basis to claim and demand protection from the authorities and, secondly, by acknowledging the legal category of refugees. It would be difficult for Malaysia to send them back or to return them because the term refugee will attach them to the principle of *non refoulement*. It should be noted however, that refugee children's entitlement to the protection of NR is not subject to the name given to them, it's their condition that make them eligible.

Secondly, without express law that recognise the existence and the status of refugees in Malaysia, they are unable to invoke and assert their rights. This situation shows that there is a significant protection gap in the Malaysian legal framework. There is a hole that cannot be filled with the CRSR. Attempts to fill the hole with provisions of the Child Act 2001 and Education Act 1996 are futile efforts. It must be realised that the situation of legal vacuum can only be filled with hard law because refugee children are denied rights and protection using

law. Therefore, a new law with express provision of protection must be adopted to prevent the existing law from having effect on refugees and refugee children.

3.10 CONCLUSION

This chapter has presented the legislations and institutions relevant to the protection of refugee children in Malaysia. A close look at Malaysian laws confirmed that the word refugee has never appeared or existed in any Malaysian legislation. Without express law refugee children are being put into the battle without arms and therefore their chance of survival is very slim. Hence, it is fair to say that the existing legal framework is incapable of granting refugee children with a protection that complies with international standards. It is apparent that even though individuals are entitled to the protection of fundamental liberties under the Federal Constitution, the status and rights of immigrant in this country are usually referred to the framework of immigration law. This position of law has made the treatment of refugees to be confined within a narrow space and naturally defeating attempts to highlight their rights under the constitutional and human rights framework. In fact, the most regular question that we ask is whether an immigrant is actually here legally and not whether we owe them any duty while they are here. Moreover, the protection of the Child Act 2001 is not enough as refugee children need more than just protection against abuse or risk of abuse. They need space and special assistance to survive and fully develop. In short, the Child Act 2001 is not a reliable source of protection for refugee children either.

Since Malaysia, is not a party to the CRSR, the CRC is a reliable and useful tool for enhancing and advancing the rights of refugee children and should be utilised as the main legal basis in

protecting refugee children in the country, apart from the customary international law. However legal impediment in implementing and applying the provisions of the CRC could not be easily surmounted. It also establishes that the domestic legal framework is not providing minimum standards of protection as required under international law.

Perceptions and rationales that Malaysia has against the CRSR and the UNCRC are influenced by the historical background, socio economic and political factors and climate in the country. The perceptions cannot be easily changed but can gradually shift to a positive tone if Malaysia could educate its people to accept refugees and continually confer generous assistance to them. Malaysia is still struggling to implement the UNCRC and is moving ahead slowly. There is still a lot to be done to ensure full implementation of the UNCRC. Recommendations made by the Committee reflect the massive amount of work and effort that must be put into realising the promise of UNCRC to all children including refugee children, the most vulnerable of all. From the outset, Malaysia's failure to enact laws to regulate refugee matters is equivalent to refutation of refugee rights. Unless and until Malaysia realises and recognises the importance of conferring refugee status particularly on refugee children, refugees will continue to be in an indeterminate state. It is important for the authority to understand that first and foremost, refugee children must be protected using express laws so that their stay can be regulated. Without this fundamental protection refugee children can be denied entry and deported. The other rights that entail are only relevant when they can stay in Malaysian territory.

Having looked at the national legal framework in this chapter, the next chapter will focus on the Malaysian practice in dealing with refugee children to show the link between lack of express protection with the way refugee children are being treated. Chapter 4 undertakes to show that it takes more than just black letter law to protect refugee children.

CHAPTER 4

THE CONDITION AND TREATMENT OF REFUGEE CHILDREN IN MALAYSIA

4.0 INTRODUCTION

This part seeks to present an overview of refugee presence in Malaysia¹ from the ‘boat people’ era in 1970s to the current arrivals, describing how refugees are generally accepted and treated by the authority and the community. It provides an in-depth information not only on the current condition of refugee children from the Philippines, Myanmar and Indonesia who are within Malaysian borders but also describe history of past arrivals of the Indochinese refugee which has now fully resolved. The treatment accorded to refugees in Malaysia is primarily influenced by the non- existence of specific legal provisions regulating internationally displaced children either in a statute regulating aliens in general, or in an exclusive statute. Other factors include the practice of the authority that makes no distinction between refugees and illegal immigrants; and reliance on the discretionary power of the authority who devised refugee policies outside the framework of human rights.²

¹ Once a Portuguese, Dutch and British colony, Malaysia attained independence in 1957 and has attracted forced migrants of different origins, races and religions from the late 1960s until today. However, migrant workers had been brought to Malaya (the name by which Malaysia was formerly known) earlier than that. Migrant workers from India and China were brought into Malaya in the 1940s and 1950s by the British to work in plantations and mines, and the number of immigrants once exceeded that of native citizens in 1950. See G P Dartford, *A Short History of Malaya* (Longmans, Green and Co., London, 1958) 146-50. Malaysia is a federation of 13 states and federal territories. Being a peninsula in the west of the country and an island in the eastern part, Malaysia has a porous border, easily accessible from many points of unofficial entry. See Sothi Rachagan, ‘Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees’ in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 261.

² See Amarjit Kaur, ‘Refugees and Refugee Policy in Malaysia’ (2007) UNEAC Asia Papers (Special Issue Refugees and Refugee Policies in the Asia Pacific Region) 77, 79. <<http://www.une.edu.au/asiacentre/PDF/No18.pdf>> accessed 16 Aug 2009.

The discussion begins with the definition of refugee children, and separated and unaccompanied refugee children. Next is the description of the arrival of refugee children in Malaysia, their treatment and current condition in Malaysia. The chapter explores, explains and analyses their situation, their plights, and the treatment to show the elements of uncertainty of status, inconsistency of treatment and non-compliance with the international standard pertaining to the rights of refugee children. The focus of discussion will be on four main refugee groups: the Indochinese, the Filipinos, the Acehnese and refugees from Myanmar. Even though there are reasons to believe that refugee children are also present among other refugee groups such as from Afghanistan, Nepal and various African countries,³ discussions in this thesis are focused on four major groups only. Two reasons can be cited for the choice: firstly, they are sufficient to portray the condition and treatment of refugee children in the country in general; and, secondly, more literature is available on these four major groups as compared to other minor groups. The last component of this chapter is an analysis on the characteristics of the treatment in general.

Before going any further, it is vital to draw attention to the reasons for deliberating on the treatment of refugee children in the past and at present. Firstly, because these discussions are relevant and important component in the presentation of the background to the research questions; especially in describing the factors that have transpired this study. Secondly, past actions in the handling of refugees will add to the body of scholarship concerning Malaysia's practice in relation to customary international law principles especially the *NR*. Finally, the

³ UNHCR Malaysia, 'Figures At A Glance' (UNHCR Malaysia, 5 Sept 2013) <www.unhcr.org.my/About_Us-@-Figures_At_A_Glance.aspx> accessed 5 Sept 2013.

discussion will show the effects of not treating refugee children in accordance with the international standards, particularly the principle of *NR* and the best interests of the child.

4.2 THE CONDITION AND TREATMENT OF THE INDOCHINESE, FILIPINO, INDONESIAN, AND MYANMAR REFUGEES

One of the most complicated legal situations that internationally displaced children can find themselves in is when they arrive in a country that has not ratify the CRSR; or any of the human rights treaties such as Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR); and does not honour the mandate of the UNHCR.⁴ Such is the condition of refugee children in Malaysia. And, like all refugee children across the globe, those in Malaysia are also vulnerable, have special needs and require special assistance to survive. Given that Malaysia is not a contracting state to any of the instruments mentioned above, internationally displaced children are finding it impossible to claim any kind of protection or assistance from the Malaysian authorities. They have to depend on UNHCR and their own community.

Even though it is a misleading notion to call the internationally displaced children in Malaysia's territory as 'refugee children' when the phrase has no legal value within the Malaysian legal framework as compared to the international law; however, as explained earlier in Chapter 1, for ease of reference and discussion the term refugee children is used to

⁴ Even in countries that ratify the CRSR children might find it hard to invoke their rights; therefore, finding themselves in non-contracting states that have also failed to ratify other human rights treaties would be even more challenging. That is why emphasis has been put on finding a mechanism that could enhance or at the very least provide an alternative protection regime for refugee children.

represent all children currently in Malaysia due to forced displacement.⁵ At this point, in Malaysia, the only way in which internationally displaced children could be legally categorised as people in need of international protection or refugees in the technical sense is

⁵ In general, internationally displaced children or forced migrants living in foreign states may fall into one of three categories: the first group is refugees in a technical sense as legally defined in the 1951 Convention Relating to the Status of Refugees (CRSR). To qualify, a child needs to fully correspond to the definition of political or technical refugee under Article 1A (2) of the 1951 Convention relating to the Status of Refugees, and this is applicable only if the child finds himself in contracting states which have ratified the CRSR or have incorporated the definition of refugee into domestic legislation and where their home government has collapsed for a specific reason beyond control and thus is no longer able to provide any protection.

The second group consists of victims of wars (persons who are not individually targeted or persecuted, as opposed to the definition of the CRSR) and natural disasters (this group is not eligible to apply for refugee status under the CRSR but their return to any territory or frontier that would pose them to any risk of torture or violation of human right is prohibited) are included in this group. This category of children cannot be returned to their country of origin or any frontier for fear of risk to their human rights, or threats to their life and fundamental freedom. Protection against return or non- *refoulement* is not exclusive to refugees but should operate to protect any person whose return would expose that person to the risk of torture as protected under the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT). Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT) reads: No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. However, this is subject to the host state's ratification of the instrument above.

The third category are children who are forcibly removed from their country of nationality or habitual residence to another state for illegal purposes such as victims of human trafficking. In this regard, it is important to note that refugees and asylum-seekers have been using the services of human traffickers and smugglers to get them to their destination or host country. In their desperate attempt to escape persecution, refugees from Indochina were said to have used the services of human smugglers for their clandestine departure from Vietnam to South-east Asian countries and sometimes to developed countries in the west. For instance the 'Hai Hong' incident where a freighter used by a smuggler syndicate and carrying 2,500 persons was forced to anchor in Port Klang, Malaysia. See Robinson, W C, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books Ltd, London, 2000) 28-30. For other examples of the use of human smugglers see discussion in C Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective', (2002) 14 IJRL 561, 577-80, 585-8. It is asserted that human smuggling is not only a root to human rights violation but also the result of severe infringement of human rights. See Tomoyo Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligation of Non-State and State Actors Under International Human Rights Law' (2005) 17 IJRL 394, 397-9. Cross-border child trafficking is a growing problem that could result in the worst form of exploitation of children. In the past, many Vietnamese children were purposely sent unaccompanied by their parents because of financial constraints and with the hope that they would have a better life in a new place. See Françoise Bory, 'Malaysia: The Flight Continues' in Red Cross, Red Crescent (1988) Sept/Dec, 16-17. It is also believed that refugee children are deliberately sent alone to become an anchor inside the resettlement country who will then become their (i.e., of parents and older siblings who would otherwise find it difficult to be resettled) reasons or supporting claim to apply for refugee status. See for instance discussion in J Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers.' (2001) 3 E.J.M.L. 283-314 on the causes of increase in the number of refugee children arriving in developed countries.

under the mandate of the UNHCR that has been taking on the role of registering and processing the asylum applications of aliens (or applications for refugee status) in the territory.⁶ Even so, being recognised as a refugee under the mandate of the UNHCR in Malaysia does not entail full enjoyment of rights or protection. In fact as presented in this chapter, UNHCR mandate is not fully respected.

Whilst not a State Party to the 1951 Convention Relating to the Status of Refugees (CRSR or refugee convention) and its protocol, Malaysia has nonetheless played a key role in hosting the mass influx of refugees into the region, especially during the infamous Vietnamese refugee interlude; and the Filipino refugee period, in collaboration with the office of the UNHCR. Its long history of providing shelter and assistance to refugees is nevertheless constantly eclipsed by criticism and low ratings.⁷ Politically speaking, the treatment accorded to different groups

⁶ The official handling and processing of internationally displaced people in Malaysia are carried out by the UNHCR. The Statute of the Office of the UNHCR provides categories of persons that fall under the mandate of the UNHCR. The provision is similar to the definition of refugee under Article 1A (2) of the CRSR. The UNHCR mandate is further enhanced by the United Nations General Assembly which resulted in persons who are internally displaced but living in a refugee-like situation to come under its wing.

⁷ See ALIRAN, 'Violence Against Refugees Continues' (*ALIRAN*, 11 Apr 2008) <http://www.aliran.com/index.php?option=com_content&view=article&id=534:violence-against-refugees-continues&catid=54:2008&Itemid=11> accessed 2 Jan 2009; The Malaysian Bar, 'Malaysia's Treatment of Refugees' (*Malaysian Bar*, 21 Aug 2003) <http://www.malaysianbar.org.my/press_statements/malaysias_treatment_of_refugees.html> accessed 3 Jan 2009; The Malaysian Bar, 'Refugee Go Home-He Would If He Could' (*Malaysian Bar*, Aug 2003) <http://www.malaysianbar.org.my/human_rights/refugee_go_home_he_would_if_he_could.html> accessed 2 Jan 2009; USCRI, 'USCR Condemns Malaysia's Arrest And Threat To Forcibly Return Acehnese Asylum Seekers' (USCRI, 22 Aug 2003) <<http://www.refugees.org/newsroomsub.aspx?id=1051>> accessed 15 Aug 2008; and USCRI, *World Refugee Survey 2008* (USCRI, 2008) 6. USCRI rated Malaysia as the seventh worst place for refugees.

of refugees has become a bone of contention between state and federal government for many years.⁸

The discussion in the next part briefly the past treatment of refugee children from Indochina, and the present practice in dealing with refugee children from the Philippines, Indonesia and Myanmar. The choice of these four groups is based on the length of their stay as compared to that of other groups. Malaysia is also a host to a small number of Thai refugees, Nepalese, Sri Lankans, Iraqis, Nigerians, Sudanese and Afghans.⁹ In the attempt to describe the presence and the treatment of refugees in Malaysia, it is important to note that from the various literatures referred to in this study, only the Indochinese and Filipinos are widely and well documented in scholarly works, government official reports and NGO reports.¹⁰

The other refugee groups receive less coverage, and thus reliable and authentic primary sources relating to them are scarce and very limited. In these circumstances, reference is also

⁸ The state of Sabah demanded serious involvement and commitment of the federal government to overcome the presence of refugees and asylum-seekers in Sabah as it claimed to have been burdened with social and economic problems. See claims made by Joseph Pairin Kitingan, the ex Chief Minister of Sabah (1985-1994) who is also a leader of PBS, a prominent political party in Sabah in his speech in 2007 at http://www.pbs-sabah.org/pbs3/html/Congress2007/ucapan_dasar_2007.html; and observation in Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future' (2009) 47 Southeast Asian Studies 52, 65. Also see demands made by political leaders in Sabah as reported in n.a., 'Refugees: MPs Free To Forward Suggestions To Parliament' *Daily Express News* (Sabah, 7 Apr 2005) 12; n.a., 'Decide On Fate Of Filipino Refugee Settlements: MP' *Daily Express News* (Sabah, 9 Dec 2005) 10; n.a., 'Bring An End to Sabah's Illegal Immigrants Woe, Radzi Urged' *Daily Express News* (Sabah, 17 Feb 2006) 12; n.a. 'Locals Facing Challenge From Immigrants Who Became Citizens, Says Masidi' *Daily Express News* (Sabah, 4 Nov 2006) 10.

⁹ For brief information on the treatment of the Thais, Sri Lankans, Iraqis and Afghans, see D Arul Rajoo, 'Issue of 131 Thai Muslim Refugee Remains Unsolved' *New Straits Times* (Kuala Lumpur, 7 June 2007) 14.

¹⁰ Such as the United States Committee on Refugee and Immigrants (USCRI), Human Rights Watch (HRW), Amnesty International (AI), Asia Pacific Migration Research Network (APRN), Aliran Kesedaran Negara (ALIRAN), Suara Rakyat Malaysia (SUARAM), and Tenaganita.

made to the websites of specific refugee groups currently residing in Malaysia. However, the contents of these websites, and the claims and allegations made in them, are not fully corroborated. Similarly, the research could not establish the complete incontrovertibility of its analysis of the government's account and reports. To rely on scholarly works alone is insufficient. Thus, slight discrepancies and differences in facts, accounts and views between refugee statements, government reports, and facts and figures from the UNHCR, and scholarly works are inevitable.

4.2.1 Indochinese Refugees (1970-1996)¹¹

4.2.1.1 Initial Response

Malaysia was one of the countries most affected by the massive influx of Vietnamese boat people¹² who fled Vietnam after the fall of the democratic government of Saigon, South Vietnam, to the communist regime of North Vietnam, which was backed by China.¹³ When they first flocked into Malaysia in May 1975, the refugees were accepted on humanitarian grounds¹⁴ and Malaysia was initially concerned about them.. They were placed in several

¹¹ For a detailed account of the Indochinese refugee flight and experience see Barry Wain, *The Refused: The Agony of the Indochinese Refugees* (Simon and Schuster, New York, 1982); W C Robinson, *Terms of Refuge: The Indochinese Exodus and The International Response* (Zed Books Limited, London, 2000) ; V O Sutter, *The Indochinese refugee dilemma* (Louisiana State University Press, Baton Rouge, 1990); C Robinson, *Crisis In Asylum: Burmese And Indochinese Refugees In Southeast Asia, Testimony Before The House Of Representatives, Subcommittee On Asian And Pacific Affairs* (US Committee for Refugees, Washington, 1990); and C Robinson, *Testimony On The United States, The CPA, And Refugee Protection Problems In Southeast Asia Before The Senate Appropriations Committee, Subcommittee On Foreign Operations* (US Committee for Refugees, Washington, 1990).

¹² Françoise Bory, 'Malaysia: The Flight Continues' in Red Cross, Red Crescent (1988) Sept/Dec, 16-17. 16.

¹³ UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action* (Oxford University Press, Oxford, UK, 2000) 80-83; Barry Wain, *op. cit.*, 37-64; W C Robinson, *op. cit.*, 10-33.

¹⁴ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 261. 253, 260; and T S Bahrin, and S Rachagan, 'The status of Displaced Filipinos in Sabah:

camps and were supported by the Red Crescent and UNHCR, which provided material assistance for them. However, the government was deeply concerned about security issues, especially the influence and spread of communist ideology among the Vietnamese and its possible impact on Malaysia.¹⁵ This fear arose because Malaysia had just experienced its own fight against the communists and was still struggling to remove members of the Malayan Communist Party (PKM) from the country.¹⁶ Despite these fears, Malaysia gave the boat people temporary refuge and acted as a country of transit before they were resettled in third countries.¹⁷

4.2.1.2 Rejection and 'Push Back' Incidents

Admission of the Indochinese refugees during the early stages was not dependent on the guarantee of resettlement places. However, when fewer resettlement places were offered by third countries in relation to the increasing number of refugees, the resettlement process became slow. Acute constraints on resources and pressure from the local people¹⁸ induced the authorities to send the boat people away and or even prevent them from landing, redirecting

Some policy Considerations and Their Long Term Implications' in Lim Joo-Jock Vani, S, *Armed Separatism in Southeast Asia* (Institute of Southeast Asian Studies, Singapore 1984) 190, 192.

¹⁵ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 261. , 253, 260; V O Sutter, *op. cit.*, 135; and Astri Suhrke, 'Indochinese Refugees: The Law and Politics of First Asylum' (1983) ANNALS AAPSS 102-115, 109.

¹⁶ V O Sutter, *The Indochinese refugee dilemma* (Louisiana State University Press, Baton Rouge, 1990);, 135. The arrival of ethnic Chinese refugees in large numbers raised trepidation about communism which was a politically sensitive issue in Malaysia during that time. See Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 261. 262; and Barry N Stein, 'Durable Solutions for Developing Country Refugees' (1986) 20 (2) Int. Migration Review 264, 276.

¹⁷ V O Sutter, *The Indochinese refugee dilemma* (Louisiana State University Press, Baton Rouge, 1990);, 165-186. The majority of the refugees were resettled in America, Canada, Australia and Europe.

¹⁸ After three years following the first boat people's departure from Vietnam, the rate of resettlement was slower and fewer places for resettlement were offered by third countries, causing critical congestion in camps. The locals accused refugees of causing price rises and grocery supply shortages because traders were keener to sell to the refugees at higher prices, the locals claimed that the authorities were neglecting the citizens who were also in need of the state's attention and financial assistance. See Rachagan, *op. cit.*, 261.

their boats to other destinations.¹⁹ By this time, the local people living on the coast where the boats normally landed had started preventing refugees from disembarking.²⁰ The government was also alarmed that hundreds of weapons were found among the Vietnamese, including firearms and ammunition, further fuelled security concerns.²¹

The 'push back' incidents led to two emergency international conferences, the first in 1979 and the second in 1989. During the first conference, pledges were made by third countries to offer more resettlement places. Thus, Malaysia agreed to continue offering temporary protection with the expectation that the refugees would be resettled in third countries such as the United States of America, Canada or Australia without delay.²² However, the arrangements made at the first conference started to fall apart when the number of arrivals rose to reach almost 4,000 in four consecutive months at the end of 1987 while the number of resettlement places was terribly low, causing several other problems including shortages of supplies, resources and shelter.²³ Thus, Malaysia resumed the 'push back' policy and other South-east Asian governments took the same approach. This called for another conference, in

¹⁹ Arthur C Helton, 'The Comprehensive Plan of Action For Indo-Chinese Refugees: An Experiment in Refugee Protection and Control' (1990-1991) 8 N.Y.L. Sch. J. Hum. Rts. 138-9.

²⁰ There were instances of refugee boats being bombarded with stones and shoved back into the sea when trying to land on the east coast. See for example Barry Wain, *op. cit.*, 129-30. These incidents were partly motivated by the difficulties faced by the locals in obtaining basic and essential items due to traders' preference for selling these items at black market rates or to organisations which catered for the refugee camps which bought in bulk. See Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 261, 261, 262.

²¹ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 261, 261, 262.

²² Malaysia consistently claims that the only feasible solution for the boat people is resettlement in third countries. See Y Zarjevski, *A Future Preserved* (Pergamon Press, Oxford, 1988) 33.

²³ Richard Towle, 'Process and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden Sharing?' (2006) 18 Int'l J. Refugee L. 537 (537- 63); and Arthur C Helton, 'The Comprehensive Plan of Action For Indochinese Refugees: An Experiment in Refugee Protection and Control' (1990-1991) 8 N.Y.L. Sch. J. Hum. Rts 111, 123.

which the Comprehensive Plan of Action on Indochinese Refugees (CPA) was endorsed, with a view to easing the departure from Indochina and the resettlement process and, most importantly, to curtailing irregular migration in future and returning those who were not actually recognised as refugees.²⁴ Consequently, Malaysia welcomed Vietnamese refugees again and made arrangements to speed up the local screening process.²⁵

4.2.1.3 Government Stand

Malaysia's official stand in relation to the boat people can be well deciphered from a reply by the then Prime Minister Datuk Hussein Onn on June 18, 1979 to the telegram he received from the Secretary-General of the United Nations concerning reports that Malaysia had been pushing back and towing away the boat people from the Malaysian coast.²⁶ In the government's view, according to the Prime Minister, as a small developing country Malaysia was not able to shoulder the burden of providing shelter for the boat people (of whom it thought it had received a disproportionate share) particularly when resettlement places could not be guaranteed.²⁷ The presence of the refugees was claimed to have caused political, economic, social and security problems.²⁸ The letter openly pointed out that Malaysia would continue to adopt restrictive measures to prevent further arrivals, such as towing away and the

²⁴ Richard Towle, 'Process and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden Sharing?' (2006) 18 Int'l J. Refugee L. 537 (537- 63)

²⁵ Arthur C Helton, 'The Comprehensive Plan of Action For Indochinese Refugees: An Experiment in Refugee Protection and Control' (1990-1991) 8 N.Y.L. Sch. J. Hum. Rts 111, 123.

²⁶ Hussein Onn, 'Policy Towards Illegal Immigrants' *Foreign Affairs Malaysia* (Kuala Lumpur, 1979) 216-19.

²⁷ Hussein Onn, 'Policy Towards Illegal Immigrants' *Foreign Affairs Malaysia* (Kuala Lumpur, 1979) 216-19, 216. The government was also upset that the rate of departure to countries of resettlement had been well below the rate of new arrivals from Indochina.

²⁸ Hussein Onn, 'Policy Towards Illegal Immigrants' *Foreign Affairs Malaysia* (Kuala Lumpur, 1979) 216-217.

only alternative to resettlement was repatriation.²⁹ By repeating that the boat people's only durable solution was resettlement in third countries, and that any residual refugee should not remain in the camps,³⁰ the Prime Minister was by implication ruling out local integration.

4.2.1.4 Refugee Camps

During their more than 20 years of cumulative stay in Malaysia, from 1975-1996, the boat people were placed in three main refugee camps, Pulau Bidong, Sungei Besi and Marang.³¹ These camps usually housed three times the capacity of their infrastructure³² and are treated as restricted areas. Indochinese refugees were confined to these camps only and had to spend their whole lives there. They had no right to work or to earn a livelihood and there was no freedom of movement.³³ Occupants of the Pulau Bidong and Sungei Besi camps had the opportunity to attend schools and undertake vocational training.³⁴

²⁹ Hussein Onn, 'Policy Towards Illegal Immigrants' *Foreign Affairs Malaysia* (Kuala Lumpur, 1979) 216, 218.

³⁰ Hussein Onn, 'Policy Towards Illegal Immigrants' *Foreign Affairs Malaysia* (Kuala Lumpur, 1979) 216, 217, 218.

³¹ United States General Accounting, 'Refugees: Living Condition is Marginal', Report to the Chairman, Select Committee on Hunger, House of Representatives (Washington, DC, 1991) GAO-NSAID 91-258, 40. UNHCR funded the set-up, management and operation of the three camps, which are now closed. The protection and security of the camps were the responsibility of the government.

³² Françoise Bory, 'Malaysia: The Flight Continues' in Red Cross, Red Crescent (1988) Sept/Dec, 16,16; and United States General Accounting, 'Refugees: Living Condition is Marginal', Report to the Chairman, Select Committee on Hunger, House of Representatives (Washington, DC, 1991) GAO-NSAID 91-258, 43.

³³ Françoise Bory, 'Malaysia: The Flight Continues' in Red Cross, Red Crescent (1988) Sept/Dec, 16-17, 16. Nevertheless, their freedom of religion was not affected at all.

³⁴ This includes dressmaking, carpentry and technical training. Refugees who were offered resettlement places were required to learn English as part of the preparation to be assimilated into a new society. See United States General Accounting, *op. cit.*, 45.

As of 1991, when the Pulau Bidong camp was closed and all occupants were moved to Sungei Besi,³⁵ it housed 530 unaccompanied refugee minors.³⁶ The management and welfare of the occupants in the camps were limited by economic and political considerations.³⁷ The other common problem that arose in the camps was the length of time taken by the authority to reach a decision on resettlement applications,³⁸ something that caused anxiety and distress to the refugees.³⁹ There were also claims that internees were pressured to return to Vietnam by UNHCR officials.⁴⁰

In an observation on the living conditions of unaccompanied minors in South-east Asia, Nguyen and Freeman came to the conclusion that the officials of the primary support agency of the Sungei Besi camp appeared to be committed to the care of unaccompanied minors and that the minors' best interests was taken into account in the making of decisions affecting

³⁵ The Sungei Besi camp, situated in Klang Valley on the outskirts of Kuala Lumpur, was the last of the three to be closed and was described as an overcrowded and unsafe place, but there were no complaints of mistreatment. See Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992), 12. See also Carrington, U, 'Working with Indo-Chinese refugees in Malaysia: First asylum camps, a social work perspective' (1993) 6 *Journal of Vietnamese Studies*, 79-86, and Helton, A C, 'The Comprehensive Plan Of Action For Indo-Chinese Refugees: An Experiment In Refugee Protection And Control' (1990) 8 *New York Law School Journal of Human Rights*, 141.

³⁶ Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992), 12.

³⁷ Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992), 12., In Pulau Bidong camp, there were complaints about the quality and quantity of food. However, a report to the Chairman, Select Committee on Hunger, House of Representatives, USA, recorded that refugees received plentiful food supplies which were nutritious and sufficient, and were given 10 litres of clean water for drinking every day. See United States General Accounting, 'Refugees: Living Condition is Marginal', Report to the Chairman, Select Committee on Hunger, House of Representatives (Washington, DC, 1991) GAO-NSAID 91-258, 39-46.

³⁸ Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992), 13.

³⁹ In Carrington, U, 'Working with Indo-Chinese refugees in Malaysia: First asylum camps, a social work perspective' (1993) 6 *Journal of Vietnamese Studies*, 79-86, 80-82.

⁴⁰ Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992) 13.

them. Education was generally emphasised, and the educational facilities provided in the camp were considered outstanding.⁴¹

4.2.1.5 Asylum Application and Durable Solutions

Asylum applications for resettlement involved interviews. Siblings consisting of adults and minors were interviewed together, as requested by many asylum-seekers,⁴² probably to enable the decision-maker to obtain a full account of the minor's claim for refugee status. The screening process was conducted by Malaysian military officers using lengthy questionnaires, and the interview was fully observed by a UNHCR legal consultant; an international interpreter was also provided throughout the screening process.⁴³ Decisions on the application were made by a senior officer without giving reasons and the asylum-seeker was given seven days to file for review and 30 days to prepare the grounds of appeal. The review decision was final, without reasons being given, and there was no provision for judicial review.⁴⁴ As for

⁴¹ Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992) 12- 13. The camp management officials gave great attention to community development; across-the-board professional counselling, and welfare. They also demonstrated sympathy for the predicament of refugees and were quite frank in discussing problems that arose in the camp. Moreover, minors were monitored closely by social workers so that any absence from school was be inquired into and dealt with if there was any problem. Many minors expressed keenness to live in the Sungei Besi camp as compared to Pulau Bidong. This was probably because internees did not have to cook: instead, they were given cooked food and the facilities in Sungei Besi according to them, were better.

⁴² Huu Dinh Nguyen and J M Freeman, *Disrupted Childhood: Unaccompanied Minors In Southeast Asian Refugee Camps* (Aid to Refugee Children Without Parents, San Jose 1992), 13

⁴³ A C Helton, 'Refugee determination under the Comprehensive Plan of Action : Overview and Assessment' (1993) IJRL 544, 549. Refugees were given several materials including information on refugee status determination, special procedures for unaccompanied minors and voluntary repatriation when they arrived in order to prepare them for the interviewing process or screening. UNHCR also held group counselling to allow refugees to ask questions.

⁴⁴ A C Helton, 'Refugee determination under the Comprehensive Plan of Action : Overview and Assessment' (1993) IJRL 544, 550. In short, the refugee determination process involved a two- tier routine; screening or interview and, later, a review session where necessary.

children, especially unaccompanied minors, they were subject to special procedures.⁴⁵ The two durable solutions taken for refugees from Indochina were voluntary return and third-country resettlement.⁴⁶

In summary, the treatment accorded to the Indochinese refugees was obviously affected and influenced by many factors, including Malaysia's security concerns about the communist threat, international pressure, pledges made by developed countries and the generous funding by the UNHCR that had made it possible to operate the refugee camps.

4.2.2 Filipino Refugees (1967-Present)

4.2.2.1 Local Reaction

Prior to the Civil War in 1972 Filipino migrants had been travelling freely between Sabah and the Southern Philippines⁴⁷ but the presence of a large influx of Filipino refugees in Sabah has been a continuous source of controversy for various reasons.⁴⁸ At present, Filipino refugees

⁴⁵ A C Helton, 'Refugee determination under the Comprehensive Plan of Action : Overview and Assessment' (1993) IJRL 544., 551. But the specific contents of that procedure were not explained in the report.

⁴⁶ In 1996, the last Vietnamese refugee left Malaysia to return to his country. The period of the boat people is over now, all the camps have been shut down and today there are no more boat people refugees staying in Malaysia. Problems concerning Indochinese refugees in Malaysia are considered resolved.

⁴⁷ Paridah Abdul Samad and Darulsalam Abu Bakar , 'Malaysia- Philippines Relations The Issue of Sabah' (1992) 32 (6) Asian Survey 554- 567, 563.

⁴⁸ See for example __ 'Refugees and Migrants not recognised', *The Star* (Kuala Lumpur, 4 Sept 1999) 17; __ 'UPKO puzzled over number of IMM13 holders' (*Daily Express*, 9 July 2004) <<http://www.dailyexpress.com.my/news.cfm?NewsID=27926>> accessed 15 March 2008; __ 'Over 600,000 IMM13 Holders, Says Tan' (*Daily Express*, 9 July 2004) <<http://www.dailyexpress.com.my/news.cfm?NewsID=27922>> accessed 15 March 2008; __ 'UPKO protests giving IMM13 holders PR' (*Daily Express*, 1 July 2007) <<http://www.dailyexpress.com.my/news.cfm?NewsID=51039>> accessed 15 March 2008; and __ ' Blitz on Illegal Immigrants in Sabah' *New Straits Times* (Kuala Lumpur, 26 June 2008) 9; for debate and

outnumber native Sabahans in some areas.⁴⁹ The Filipinos fled their homeland due to armed conflicts and civil wars that had erupted and continued in Mindanao since the late 1960s. The clash between the government army and the Muslim secessionist group in the southern Philippines, particularly the Mindanao National Liberation Front (MNLF) which fought for independence from the federal government, has forced many of its population to seek refuge in Sabah, the nearest foreign territory to the Southern Philippines.⁵⁰

Landing first on the coast of Sabah in the late 1960s, the number of refugees was quick to accelerate.⁵¹ They were initially granted permission to remain in Sabah on humanitarian grounds and were located in coastal areas in Sandakan, Tawau and Kota Kinabalu.⁵² There were also reports that the Filipinos were granted refugee status upon arriving, despite their illegal entry and supplied with documentation within 14 days of arrival, including renewable annual immigration passes, with no time limit to return to the Philippines being imposed on the bearer.⁵³ In fact, there has been little effort to resettle the refugees in third countries or to restrict further arrivals.⁵⁴ At the same time, Sabah was also said to have become a training

argument on the status of Filipino refugees and the treatment that this group is receiving. The authorities are also reluctant to make a concrete statement about the legal status of the Filipinos.

⁴⁹ M H Adnan, 'Refugee Issues in Malaysia: The Need for a Proactive, Human Rights Based Solution' (2007) UNEAC Asia Papers <<http://www.une.edu.au/asiacentre/papers.php>> accessed 12 Jan 2010.

⁵⁰ Vitit Muntarbhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) 115.

⁵¹ Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia- Philippines Relations The Issue of Sabah' (1992) 32 (6) Asian Survey 554- 567, 555.

⁵² Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia- Philippines Relations The Issue of Sabah' (1992) 32 (6) Asian Survey 554- 567, 556.

⁵³ Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia-Philippines Relations The Issue of Sabah'(1992) 32 (6) Asian Survey 554, 557.

⁵⁴ See H Gunggut, et al, 'Illegal Immigrant Entry Into Sabah: Policy Statements and Practices' (2007) 4 (1) Journal of Administrative Science 40, 43.

ground for Moro separatists and a smuggling point to transport weapons into the Southern Philippines.⁵⁵

It was claimed that a serious labour shortage was the real reason for permitting Filipino refugees to stay, because they could be recruited to work in the logging and plantation sector.⁵⁶ It was also submitted that the Sabah state government led by Tun Mustapha, the Chief Minister, was personally and politically motivated in admitting Muslim refugees in order to strengthen his political position. The integration of these Muslim refugees would help to increase the membership of the United Sabah National Organisation (USNO) and would eventually bolster its political standing in Sabah.⁵⁷

4.2.2.2 Treatment

Despite existing discrepancies in the actual number of Filipino refugees currently residing in Sabah, it is more surprising that they have been neither considered nor counted by the UNHCR as refugees since 2003. More than 45,000 Filipino refugees sought refuge in Malaysia from 1998 to 2002:⁵⁸ at the end of 2004, there were 61,300 Filipino Muslims in

⁵⁵ Thomas M McKenna, *Muslim Rulers and Rebels* (University of California Press, Los Angeles, 1998), 146-57; Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia-Philippines Relations The Issue of Sabah'(1992) 32 (6) *Asian Survey* 554, 559; and Lela Garner Noble, 'Ethnicity and Philippines-Malaysia Relationship' (1975) 15 (5) *Asian Survey* 453, 464-5.

⁵⁶ T S Bahrin, and S Rachagan, 'The status of Displaced Filipinos in Sabah: Some policy Considerations and Their Long Term Implications' in Lim Joo-Jock Vani, S, *Armed Separatism in Southeast Asia* (Institute of Southeast Asian Studies, Singapore 1984) 190, 198.

⁵⁷ T S Bahrin, and S Rachagan, 'The status of Displaced Filipinos in Sabah: Some policy Considerations and Their Long Term Implications' in Lim Joo-Jock Vani, S, *Armed Separatism in Southeast Asia* (Institute of Southeast Asian Studies, Singapore 1984) 190, 198..

⁵⁸ UNHCR, *2002 UNHCR Statistical Yearbook* (UNHCR, 2004) 380.

Malaysia.⁵⁹ The explanation for this apparent ‘disappearance’ is because they are now placed on the register as ‘others of concern’ to UNHCR, a different group that does not fall under the headings of refugees, asylum-seekers, internally displaced persons or stateless persons. This new classification may have been prompted by the improved situation in the Southern Philippines, where persecution is no longer present, though this was not actually suggested by the UNHCR. This move has lent support to the claims made by political leaders, who demand that the Federal Government return the refugees to their homeland because they are no longer refugees.

Filipino refugees were not merely treated differently and generously accepted by the government; in fact, a large number of them were even granted permanent resident status and citizenship.⁶⁰ Since the Filipinos are willing to accept low wages, they easily found employment at local plantations, business premises and factories. The liberal support given to this group was also motivated by religious ties, as most of them were Muslims.⁶¹ The UNHCR was also present to assist them from 1976 to 1987. During this period, the government and the

⁵⁹ UNHCR, *2004 UNHCR Statistical Yearbook* (UNHCR, 2006) 29.

⁶⁰ Vitit Muntarbhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) 115; and Sin Fong Han, ‘A Constitutional Coup D’état: An Analysis of the Birth and Victory of the BERJAYA Party in Sabah, Malaysia’ (1979) 19 (4) *Asian Survey* 379, 389

⁶¹ Dorall RF, ‘Muslim Refugees in Southeast Asia, the Malaysian Response’ (1988) *Asian Migrant* 1 (3): 88- 93 , Vitit Muntarbhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) 113-120; and Sothi Rachagan, ‘Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees’ in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 251, 257. However, it should also be highlighted that the Filipino refugees have been able to easily and quickly adapt to the local life because of the support, assistance and protection provided by the early Filipino economic migrants who were already settled in Sabah. See for instance Halina Sandera Mohd Yakin, *Akultrasi Migran Filipina Generasi Pertama dan Kedua di Sabah* (Universiti Malaysia Sabah, Kota Kinabalu 2003) 20-2

UNHCR made an effort to integrate them into the local community, and fund their housing, healthcare facilities and even schooling.⁶²

The UNHCR, with close cooperation from the Federal Government, has relocated this group in 34 resettlement villages including six main sites in Kinarut, Tawau, Telipok, Sandakan, Labuan and Lahad Datu which consist of wooden huts, roads, mosques and schools.⁶³ In stark contrast to the Indochinese refugees, the occupants of all these resettlement sites are allowed to leave these sites and able to enjoy full freedom of movement and the right to work. Occupants of these sites were also allocated plantation land, fishing boats and nets and trading facilities to help them earn a living.⁶⁴ These settlements are still in operation today but are often associated with various criminal activities,⁶⁵ especially drug abuse.⁶⁶ The Federal Government issued Filipino refugees with a special pass (HF7, which was later replaced by

⁶² Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 251, 259.

⁶³ Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge, J R (ed.) *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 251, 260.

⁶⁴ T S Bahrin, and S Rachagan, 'The status of Displaced Filipinos in Sabah: Some policy Considerations and Their Long Term Implications' in Lim Joo-Jock Vani, S, *Armed Separatism in Southeast Asia* (Institute of Southeast Asian Studies, Singapore 1984) 190, 194.

⁶⁵ ___ 'Local Killed at Refugee Centre' *Daily Express* (Sabah, 12 Feb 2005)
< <http://www.dailyexpress.com.my/news.cfm?NewsID=32533> > accessed 15 March 2008; ___ 'Resiting Refugee Camp Necessary' *Daily Express* (Sabah, 3 Apr 2005)
<http://www.dailyexpress.com.my/news.cfm?NewsID=33649> accessed 15 March 2008; Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia- Philippines Relations The Issue of Sabah' (1992) 32 (6) Asian Survey 554- 567, 563

⁶⁶ See for instance ___ 'Refugee settlement's special syabu service' *Daily Express* (Sabah, 19 Jan 2005)
<http://www.dailyexpress.com.my/news.cfm?NewsID=32073> accessed 15 March 2008; ___ 'Refugee Camp Drug Bust' *Daily Express* (Sabah, 20 Apr 2005)
<http://www.dailyexpress.com.my/news.cfm?NewsID=34014> accessed 15 March 2008; ___ 'Filipino refugees and Syabu are the same' *Daily Express* (Sabah, 25 Aug 2005)
<http://www.dailyexpress.com.my/news.cfm?NewsID=36677> accessed 15 March 2008; ___ 'Decide on Fate of Filipino Refugee Settlements: MP' *Daily Express* (Sabah, 9 Dec 2005)
<http://www.dailyexpress.com.my/news.cfm?NewsID=38889> accessed 15 March 2008; and ___ 'Kinarut Drugs Due to refugees; needs police base, says MP' *Daily Express* (Sabah, 12 Aug 2006)
<http://www.dailyexpress.com.my/news.cfm?NewsID=43737> accessed 15 March 2008.

IMM13) that allows the refugee to stay and work in Sabah without time limit, but only in the plantation, manufacturing and domestic sectors; and the policy of allowing the Filipino refugees to work remains to this day,⁶⁷ albeit with certain conditions.

When the conditions in the Southern Philippines had improved, many refugees were assisted to return.⁶⁸ From 1987 the UNHCR terminated its services and closed its office in Sabah, stating that the Filipinos were independent, their standard of living had improved to the point where it was comparable to that of the locals and they were able to stand on their own two feet.⁶⁹ This was not easily accepted by the state authority who accused the UNHCR office of merely washing its hands of the problem of Filipino refugees when it became unmanageable; some even suggested that the action showed that the Filipinos were not genuine refugees who qualified for the help and assistance of the UNHCR.⁷⁰ Nevertheless the Sabah state government took over the task of managing those who had not voluntarily returned.

Sabah was later, at the end of the 1980s, to become overrun by economic migrants from Indonesia and the Philippines in sufficiently large numbers to trigger concern over the security of the country. There were in fact incidents of infiltration of the resettlement sites by illegal

⁶⁷ See Pasukan Petugas Khas Persekutuan, 'Apa Yang Anda Perlu Ketahui Mengenai Pendatang Luar Negara' (Jabatan Perdana Menteri, 2010) < <http://www.p.sabah.gov.my/ppk/faq.asp> > accessed 25 Feb 2010

⁶⁸ Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia- Philippines Relations The Issue of Sabah' (1992) 32 (6) *Asian Survey* 554- 567, 565

⁶⁹ Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future' (2009) 47 *Southeast Asian Studies* 52, 65

⁷⁰ — 'Truth Why No UNHCR Rep Here' *Daily Express* (Sabah, 6 July 2006) <<http://www.dailyexpress.com.my/news.cfm?NewsID=42988>> accessed 15 March 2008.

immigrants; hence, the administration of the sites was taken over by the Federal Government under the Special Federal Task Force (Sabah and Labuan).⁷¹

4.2.2.3 Change of State Government and its Effects

The change of state government in Sabah had a major impact on the lives of the refugees. During the administration of USNO (1967-75) and later the Berjaya government (1976-85), the refugees were generously supported but their rights were gradually withdrawn. The Parti Bersatu Sabah (PBS), dominated by non-Muslims, which ruled Sabah from 1986, started to show resentment towards the refugees, agitating for their exclusion.⁷² Proposals to legalise their status by granting them Permanent Resident status have been vehemently opposed by various parties.⁷³ Today, the Filipino refugees are generally stereotyped as illegal immigrants; they are often blamed for taking away jobs from the locals; and are accused of becoming a source of social problems and threats to security. They are even blamed for putting strains on social services and public amenities.⁷⁴ In a politically related issue, the refugees are said to have been issued with fake identity cards to enable them to vote in elections, and this further

⁷¹ The Pasukan Petugas Khas Persekutuan or the Special Federal Task Force, established under the National Security Council of the Prime Minister's Department, is responsible for registering and categorising Filipino immigrants in Sabah into refugee, migrant workers and illegal immigrants. See Pasukan Petugas Khas Persekutuan, 'Bidang Tugas' (*Jabatan Perdana Menteri*, 2010) <<http://www.p.sabah.gov.my/ppk/tugas.asp>> accessed 25 Feb 2010. Despite having two institutions to oversee the refugees, the sites are left in a deplorable condition: they are not well maintained, become overcrowded and social problems such as drug abuse and gambling continue to occur. The children also suffer from a lack of access to formal education but this is actually influenced by the change of state government and to amendments made to the school registration and enrolment process at the national level. See Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future' (2009) 47 *Southeast Asian Studies* 52,61-6.

⁷² Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future' (2009) 47 *Southeast Asian Studies* 52,

⁷³ ___ 'UPKO puzzled over number of IMM13 holders' *Daily Express*; ___ 'Over 600,000 IMM13 Holders, Says Tan' *Daily Express*; and ___ 'UPKO protests giving IMM13 holders PR' *Daily Express*.

⁷⁴ Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future' (2009) 47 *Southeast Asian Studies* 52,, 67-78; ___ 'The Illegals to Blame', *Daily Express* (Sabah, 24 March 1982) 10; and ___ 'Chief Minister: Aliens Straining Health Facilities', *Borneo Mail* (Sabah, 2 Aug 1992) 16.

escalates rejection and anger among the local community.⁷⁵ The position of Filipino refugees is as complex as that of the other refugee groups. First, it is very difficult to distinguish between genuine refugees and economic migrants as the number is too large; and second, after originally being recognised as refugees, the Filipinos are now not counted as refugees under the UNHCR statistics, causing them to remain in legal limbo. It will be an arduous task to make a case for their legal position and rights in the country.⁷⁶

The on-going conflict between the Sabah state government and the federal government basically concerns the liberal approach adopted by the federal government in granting permanent resident status and citizenship to the Filipinos⁷⁷ without having regard to the views of Sabahans, while Sabah is left to cope with the problem on its own.⁷⁸ Lack of federal government effort in tackling the longstanding refugee problems and related issues is another

⁷⁵ See discussion in Kamal Sadiq, 'When States Prefer Non- Citizens over Citizens: Conflict Over Illegal Immigration into Malaysia' (2005) 49 *International Quarterly Studies* 101, 104, 116- 19 in which he elaborates on the strategy of political parties in Malaysia in exploiting the Filipino refugees and immigrants; Leon Coma, 'No to 8,000 Holders of fake IC', *Daily Express* (Sabah, 24 March 1990) 20; and ___ 'Illegals as Voters: PBS Calls for a Probe', *Sabah Times* (Sabah, 28 Sept 1992) 4.

⁷⁶ The non-recognition can be explained as follows. In 2000, relations between Malaysia and the Philippines had become strained as a result of the kidnap of a number of Malaysians and foreign tourists by Abu Sayyaf, a Moro separatist group. Consequently Sabah's coast was barred to the arrival of refugees and asylum-seekers from the Philippines. Later, in 2001, the refugee status granted earlier was revoked and they are required to secure work permits in order to remain in Sabah. One must bear in mind that only those who came to Sabah before 1976 were given refugee status; thus the remaining Filipinos from the Southern Philippines who came after that period, are not recognised as refugees. See Paridah Abdul Samad and Darulsalam Abu Bakar, 'Malaysia- Philippines Relations The Issue of Sabah' (1992) 32 (6) *Asian Survey* 554- 567, 566.

⁷⁷ See above Note 106; Muguntan Vanar, 'Sabah BN and Opposition Leaders Refuse to Accept Filipino Refugees' *The Star Online* (Kuala Lumpur, 20 July 2007) <<http://thestar.com.my/news/story.asp?file=/2007/7/20/nation/18354504&sec=nation>> accessed 18 Sept 2009; NT HA SP Ron, 'Hanya Kerajaan Pusat Mampu Selesaikan Isu Pelarian' *Berita Harian* (Kuala Lumpur, 9 Aug 2007) 9; and ___ 'Musa Rejects Call to Grant PR to Illegals', *New Sunday Times* (Kuala Lumpur, 6 July 2008) 12.

⁷⁸ A political leader in Sabah suggested that the problem of Filipino refugees should be equally shared among Malaysian states by dispersing the refugees to all regions. ___ 'UPKO Syor Agih 61,000 Pelarian' *Berita Harian* (Kuala Lumpur, 2 July 2007) 11

claim made against Kuala Lumpur.⁷⁹ In 2012, the government set up the Royal Commission Inquiry (RCI) on illegal immigrants in Sabah after numerous calls by various parties.⁸⁰ At one of the session, the RCI was told that the large migrant population in Sabah is a threat to security.⁸¹

4.2.3 Indonesian Refugees (1990-Present)

4.2.3.1 Arrival and Acceptance

Most Indonesian refugees came from the Aceh province, on the island of Sumatra, separated from peninsular Malaysia by the straits of Malacca. During the counterinsurgency operation of 1990-1993 many Acehnese fled to Malaysia; this flight resumed when the military offensive began in May 2003 against the members of the Free Aceh Movement or *Gerakan Aceh Merdeka* (GAM)⁸² due to widespread human rights violations including extra-judicial executions, forced disappearances, beatings, arbitrary arrests and detentions, extreme restriction on freedom of movement and the singling out of young men whom the military claimed to be supporters of GAM.⁸³ After the tsunami tragedy of 2004, more Acehnese had

⁷⁹ Ruben Sario, 'Grappling With an Old Problem' *The Star Online* (Kuala Lumpur, 18 Nov 2007) <http://thestar.com.my/news/story.asp?file=/2007/11/18/focus/20071118092336&sec=>> accessed 13 May 2009. The issue of Filipino refugees also ties in with the fact that the state of Sabah is unhappy with the federal government about several matters, including those pertaining to 'Sabah rights' in relation to politics, social issues, and finance. For further understanding of the ongoing disagreement see Sabihah Osman, 'Sabah State Election Implications for Malaysian Unity' (1992) 32 (4) *Asian Survey* 380- 91.

⁸⁰ Ruben Sario, 'Calls Grow for RCI on Migrants in Sabah' *The Star* (Kuala Lumpur, 10 Nov 2011). Its Term of Reference includes to investigate if the award of identity cards or citizenship to illegal immigrants are made in accordance with law; and the reason behind abnormal growth of Sabah's population. 5

⁸¹ Stephanie Lee, 'Large Migrant Population a Security Risk to Sabah, RCI told' *The Star* (Kuala Lumpur, 24 May 2013) 4.

⁸² Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) 16(5) (C) *Human Rights Watch* 4.

⁸³ Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) 16(5) (C) *Human Rights Watch* 4.

come to Malaysia for shelter and they were allowed to stay and work for an initial two years, and later another year after renewing their visas.⁸⁴

As compared to other nationals, Indonesian refugees and migrants are the most 'suspect' group and have long been a source of controversy in Malaysia due to the large number of economic and illegal migrants with a presence in the country both in the Peninsula and in Borneo.⁸⁵ Although Acehnese refugees are mostly Muslims, their treatment has not been as generous as or even equal to that of the Muslim Filipinos, who were granted Permanent Resident status. The Acehnese are subject to arrest, detention and deportation⁸⁶ and there has been no liberal or accommodating treatment for them; instead, they are treated as illegal immigrants despite clear persecution issues in their homeland.⁸⁷ However, the number of Acehnese refugees is decreasing due to positive changes in their homeland, and many have returned home.⁸⁸ However, many are still not able to return or travel because they do not have the necessary documents, or have financial difficulties.

⁸⁴ NJ Kay, '27,000 Pelarian Aceh Diingat Perbaharui Visa Elak Dikenakan Tindakan' *BERNAMA* (Kuala Lumpur, 20 Aug 2007) 8

⁸⁵ Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) 16(5) (C) *Human Rights Watch* 4.

⁸⁶ Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) 16(5) (C) *Human Rights Watch* 4; and UNHCR, 'Malaysia Deports Asylum Seekers to Aceh Despite UNHCR Appeal' (*UNHCR*, 5 Sept 2003) <<http://www.unhcr.org/news/NEWS/3f58b05a4.html>> accessed 16 Jan 2009

⁸⁷ Baradan Kuppusamy, 'Acehnese get cold welcome in Malaysia' (*Asia Times Online*, 22 Aug 2003) <http://www.atimes.com/atimes/Southeast_Asia/EH22Ae01.html> accessed 16 Sept 2008.

⁸⁸ Shamini Darshni et al, 'Malaysia hosts 40,000 Refugees', *New Straits Times* (Kuala Lumpur, 17 Apr 2007) 12.

4.2.3.2 Treatment

The Acehnese are forced to survive on their own: there are no special sites for lodging them and no freedom of movement or right to work. A proposal to grant them the right to work was realised only in 2005, when between 32,000 and 35,000 work permits for a period of two years were issued, with a later extension of one year.⁸⁹ The Acehnese may approach UNHCR officers to apply for determination of their refugee status and to be resettled in a third country. Nevertheless, even when they are recognised as refugees and given UNHCR identification papers, they are still subject to harsh enforcement such as raids and arrests⁹⁰ by multiple authorities such as the police, immigration officers and the Malaysian voluntary army or the RELA force. Upon conviction for any charge of offences under the Immigration Act 1959/63, they are subject to imprisonment, caning and deportation.⁹¹ Indonesian children are not entitled to free elementary education and have to pay before they can be enrolled in state-run schools, but this has proved to be too expensive for them. In a number of illegal immigrant crackdowns, hundreds of Acehnese were also detained and later deported to Indonesia even when they produced their IMM13 passes or UNHCR documents.⁹²

⁸⁹ NJ Kay, '27,000 Pelarian Aceh Diingat Perbaharui Visa Elak Dikenakan Tindakan' *BERNAMA* (Kuala Lumpur, 20 Aug 2007) 8.

⁹⁰ US Committee for Refugees, *The least risky solution: Malaysia's detention and deportation of Acehnese asylum seekers* (US Committee for Refugees, Washington 1998); Human Rights Watch, 'Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia' (2004) Human Rights Watch Vol. 16. No. 5 (C) p. 8; and Human Rights Watch, 'Malaysia: Disband Abusive Volunteer Corps' (Human Rights Watch, 9 May 2007) http://hrw.org/english/docs/2007/05/08/malays15885_txt.htm accessed 16/4/2008.

⁹¹ Amnesty International, 'Malaysia Human Rights at Risk in Mass Deportation of Undocumented Migrants' (Report) (12/2004) AI Index: ASA 28/008/2004, p. 6-9; and FIDH & SUARAM, 'Undocumented Migrants and Refugees in Malaysia: Raids, Detention and Discrimination' (Report) (International Federation for Human Rights, 19 March 2008) <http://www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf> accessed 15 Nov 2008.

⁹² Yante Ismail, 'UNHCR urges Malaysia to protect refugees during crackdown' (*UNHCR*, 4 March 2005) < <http://www.unhcr.org.my/cms/news-and-events/news-040305> > accessed 22 Sept 2008

4.2.4 Refugees from Myanmar/Burma⁹³ (1980-Present)

4.2.4.1 Arrival

Myanmar has been in continuous constitutional and political crisis for over five decades, a situation which has led to ethnic conflict and civil war⁹⁴ and resulted in dislocation and refugee migration. The two biggest refugee groups from Myanmar who came to Malaysia were the Rohingyans and the Chins. Both were minority ethnic groups in Myanmar, with the majority of the Rohingyans being Muslims, while Christianity is the dominant religion of the Chins. Because of their ethnic and religious minority status in Myanmar, both groups were persecuted by the military government regime and are constantly subject to summary and extrajudicial killings, arbitrary arrest and imprisonment, torture, rape, forced relocation, forced labour and other violations of basic human rights.⁹⁵ They chose to flee to Malaysia because they believed that the risk of being directly deported back to Myanmar from there was lower than from any other destination.⁹⁶

⁹³ The name Burma was changed to Myanmar in 1989 by the military regime under the State Law and Order Restoration Council (SLORC) despite opposition from political opponents who perceived the change as illegitimate. The UN and many other governments recognised this new name and thus Myanmar is used in this text. See Hazel Lang, 'The Repatriation Predicament of Burmese Refugees in Thailand: A Preliminary Analysis' (July 2001) UNHCR Working Paper No. 46, Canberra: Australian National University
< <http://www.unhcr.org/3b7d24214.html>> accessed 14 June 2009; and International Crisis Group, 'Myanmar: The Politics of Humanitarian Aid' Asia Report No. 32 (*International Crisis Group*, Apr 2002)
<<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/Myanmar%20The%20Politics%20of%20Humanitarian%20Aid.ashx>> accessed 14 June 2009.

⁹⁴ Salai Ngun Cung Lian, 'Constitutional Crisis in Burma' (*Chin Human Rights Organisation*, 2008)
< http://eng.chro.org/index.php?option=com_content&task=view&id=84&Itemid=27> accessed 12 Jan 2009

⁹⁵ Chin Human Rights Organisation , 'Seeking a Safe haven: Update on the Situation of the Chin in Malaysia' (*Chin Human Rights Organisation*, 2006)
<http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf >accessed 13 Jan 2009

⁹⁶ Chin Human Rights Organisation, 'Seeking a Safe haven: Update on the Situation of the Chin in Malaysia' (*Chin Human Rights Organisation*, 2006)

4.2.4.2 Living Conditions

The Rohingyans and Chins both live a precarious existence in Malaysia. Many are detained at immigration detention centres⁹⁷ and the conditions have been described as overcrowded and unhygienic, with insufficient food, an absence of on-site medical services and frequent abuse by the guards or officers in charge,⁹⁸ many have been deported, too.⁹⁹ If they have UNHCR identity papers, they are allowed to remain temporarily in Malaysia but they are not allowed to take up jobs. However, many have managed to find work, often dangerous, dirty and underpaid.¹⁰⁰ Because of their status, they were often hired by exploitative employers who would report them to the immigration authorities to escape the obligation of paying their salaries.¹⁰¹ Since they are underpaid and sometimes cheated, it is difficult for them to make ends meet and, as a result, they do not have enough nutritious food, are extremely prone to

<http://www.refugees.org/uploadedfiles/CHRO%200706Seeking_a_Safe_Haven.pdf> accessed 13 Jan 2009.

⁹⁷ Chin Human Rights Organisation, 'Rela Raids Refugee Neighbourhood Arrests Dozen' (2010) XIII (VI) Rhododendron News 15

<http://www.chro.ca/images/stories/files/Rhododendron_Nov_Dec_2010.pdf> accessed 30 Dec 2010; Chin Human Rights Organisation, 'Long Detained Refugee Reunite With Family' (2010) XIII (IV) Rhododendron News 16-17 (*Chin Human Rights Organisation*)

⁹⁸ <http://www.chro.ca/images/stories/files/Rhododendron_July_Aug_2010.pdf> accessed 25 Oct 2010; Chin Human Rights Organisation, 'Seeking a Safe Haven: Update on the Situation of the Chin in Malaysia' (*Chin Human Rights Organisation*, 2006) 4,

⁹⁹ <<http://www.chro.ca/index.php/publications/special-reports>> accessed 13 Jan 2009. Fauwaz A. Aziz, 'Refugee Treatment: A Big Fat F for Malaysia' (*Myanmar Ethnic Rohingyans Human Rights Organisation Malaysia*) <<http://merhrom.wordpress.com?2007/06/21/refugee-treatment-a-big-fat-f-for-malaysia>> accessed 14 Jan 2009. Myanmar refugees are treated similarly in Thailand but most of them are living in camps whereas Singapore, which is yet to accept any Myanmar refugees had already declared its firm stand of not welcoming any refugee from Myanmar but of assisting them to depart to a third country. See __, 'Singapore cannot accept Rohingya refugees', (*Channelnews Asia.com*, 24 March 2009)

<<http://www.channelnewsasia.com/stories/singaporelocalnews/view/417415/1/.html>> accessed 12 March 2010

¹⁰⁰ Chin Human Rights Organisation, 'Seeking a Safe Haven: Update on the Situation of the Chin in Malaysia' (*Chin Human Rights Organisation*, 2006) 6, <<http://www.chro.ca/index.php/publications/special-reports>> accessed 13 Jan 2009.

¹⁰¹ Chin Human Rights Organisation, 'Seeking a Safe Haven: Update on the Situation of the Chin in Malaysia' (*Chin Human Rights Organisation*, 2006) 56, <<http://www.chro.ca/index.php/publications/special-reports>> accessed 13 Jan 2009.

health problems, have no choice but to live in appalling conditions and live in constant fear.¹⁰²

It is normal for refugees from Myanmar to share a flat with 20-30 people or to live in the jungle without access to clean water and appropriate sanitation systems.¹⁰³ Access to health services for all refugees is more or less the same: they have to pay to attend government hospitals: they are offered a 50 per cent discount on the charge for non-citizens, or may alternatively go to private clinics, for which the cost is an obstacle.¹⁰⁴

4.2.4.3 Assistance

The government has no provisions whatsoever to assist refugees from Myanmar, so they rely on UNHCR and NGOs for support in such areas as education, free medical services, counselling and training.¹⁰⁵ They are always in a state of fear of raids and crackdowns on illegal and undocumented migrants in the country, which have often affected them. This is due to deliberate failures and refusals by the Malaysian authorities, namely the immigration officers, the police and RELA, to recognise UNHCR identity papers, and these authorities have arrested and deported refugees or asylum-seekers in many reported cases.¹⁰⁶ As for the Rohingya refugees and asylum-seekers, the government in 2004 agreed to grant them the

¹⁰² Yoges Palaniappan, 'Refugees Live in State of Fear' (Myanmar Ethnic Rohingyans Human Rights Organisation Malaysia, 21 June 2007) <<http://merhrom.wordpress.com?2007/06/21/refugees-live-in-state-of-fear>> accessed 14 Jan 2009

¹⁰³ Chin Human Rights Organisation, 'Seeking a Safe Haven: Update on the Situation of the Chin in Malaysia' (*Chin Human Rights Organisation*, 2006) 7-8, <<http://www.chro.ca/index.php/publications/special-reports>> accessed 13 Jan 2009.

¹⁰⁴ Medecins Sans Frontieres (MSF), 'We Are Worth Nothing: Refugee and Asylum Seeker Communities in Malaysia' (MSF, 13 Apr 2007) 5-9, <<http://www.msf.org/source/countries/asia/malaysia/2007/MSFbriefingpaper.pdf>> accessed 13 Jan 2009 .

¹⁰⁵ Medecins Sans Frontieres (MSF), 'We Are Worth Nothing: Refugee and Asylum Seeker Communities in Malaysia' (MSF, 13 Apr 2007) 5-9, <<http://www.msf.org/source/countries/asia/malaysia/2007/MSFbriefingpaper.pdf>> accessed 13 Jan 2009 .

¹⁰⁶ Refugees International, 'Malaysia: Government Must Stop Abuse of Burmese Refugees and Asylum Seekers' (*Refugee International*, 23 May 2007) < <http://www.refugeesinternational.org/policy/field-report/malaysia-government-must-stop-abuse-burmese-refugees-and-asylum-seekers>> accessed 10 Jan 2009

IMM13 special pass¹⁰⁷ which allows the holder to remain in Malaysia for a certain period. However the implementation of this has yet to be realised.¹⁰⁸ This is in fact a form of discrimination, since the Christian Chins are not granted the same privilege. However, from the government's point of view, the grant of the IMM13 special pass will only attract more Rohingyans to Malaysia and thus the registration of Rohingyans for the purpose of granting the pass, in 2006, was cancelled after a month.¹⁰⁹ Surprisingly, after all the promises, Malaysia took a totally opposite stand on the Rohingyans. During the ASEAN leaders' summit in 2009 it was agreed that Rohingya refugees should now be termed 'illegal immigrants of the Indian Ocean' and that the problem should be systematically dealt with.¹¹⁰ This undertaking, again, is just another promise.

4.2.4.4 Deportation

On a number of occasions, refugees from Myanmar have been deported,¹¹¹ not necessarily to Myanmar because the Myanmar authorities will certainly refuse to accept them because they

¹⁰⁷ IMM13 is a special pass granted to foreigners either in the form of special document produced under Form 16 of the Malaysian Immigration Act 1965/ 1963 or in the form of endorsement in the passport or travel document of an applicant.

¹⁰⁸ Myanmar Ethnic Rohingyans Human Rights Organisation Malaysia (MERHROM), 'Rohingya Refugees' Dilemma Remains Unsolved' (MERHROM, 21 June 2007) <<http://merhrom.wordpress.com?2007/06/21/rohingya-refugees'-dilemma-remains-unsolved>> accessed 14 Jan 2009.

¹⁰⁹ The government claim however was not attached with any proof for the public.

¹¹⁰ __ 'Rohingyas Are Now Termed Illegal Immigrants' (*The Star Online*, 2 March 2009) <<http://thestar.com.my/news/story.asp?file=/2009/3/2/nation/3382192&sec=nation>> accessed 22 Aug 2010; and __ 'ASEAN Setuju Urus Isu Pelarian Rohingya Secara Sistematis' Utusan Online (Kuala Lumpur, 2 March 2009) <http://www.utusan.com.my/utusan/info.asp?y=2009&dt=0302&pub=Utusan_Malaysia&sec=Muka_Hadapan&pg=mh_04.htm> accessed 22 Aug 2010.

¹¹¹ __, 'Tenaganita: Stop Deporting Rohingya Refugees' (*Daily Express*, 3 Sept 2005) <<http://www.dailyexpress.com.my/news.cfm?NewsID=36857>> accessed 15 March 2008; Amy Alexander, 'Hundreds Arrested in Malaysia Immigration Raids' (CHRO, 25 June 2007) <<http://www.chro.ca/action-alerts/refugees-concern/220-hundreds-arrested-in-malaysia-immigration-raids.html>> accessed 13 Jan 2009; Julia Zappei, 'Malaysian Officers Held Over Burmese Migrants Sale' (Tenaganita, 21 July 2009)

are not recognised as citizens of Myanmar. For that reason, they are deported to Thailand because refugees from Myanmar are known to have entered Malaysia across the Thai border. This means, though, that the deportations have exposed the refugees to the risk of being deported to Myanmar, where they were previously persecuted by the state. Like Malaysia, Thailand is also not a State Party to the CRSR. The other hazard associated with the deportation process is the sale or handing-over of the refugees to human smugglers and traffickers.¹¹²

4.3 MISTREATMENT AND VIOLATION OF THE RIGHTS OF REFUGEE CHILDREN

Although many refugee children are allowed to remain in the country temporarily, they are unable to enjoy their basic rights as children. Many other children are refused entry and deported. Since their very existence in the country is based on the discretion of the government, any violation of their rights is not taken seriously. The identity papers issued by the UNHCR carries little weight and can be easily overruled by the authorities. Since UNHCR is operating outside the legal framework, disagreement between the body and the authority is inevitable even though it works closely with the SUHAKAM.¹¹³ After unsuccessful attempts by the UNHCR to convince Malaysia to accede to the CRSR during the Vietnamese refugee era and its repeated statement of refusal to ratify the convention, there is not much hope to see that Malaysia will ever ratify the CRSR in the near future. Enactment of specific laws to

< http://www.tenaganita.net/index.php?option=com_content&task=view&id=320&Itemid=69> accessed 18 Aug 2009.

¹¹² Julia Zappei, 'Malaysian Officers Held Over Burmese Migrants Sale' (Tenaganita, 21 July 2009)

< http://www.tenaganita.net/index.php?option=com_content&task=view&id=320&Itemid=69> accessed 18 Aug 2009.

¹¹³ Cross refer discussion in **3.5**.

protect refugee children also cannot be guaranteed. That is the reason why this study decides to look at the applicability of the principle of customary international law in the protection of refugees in domestic courts in order to improve the condition and protection of refugee children in the country.

Even with direct assistance from the UNHCR, refugees and asylum seekers find themselves in uncertain legal status; identification papers are not recognized and relied on easily altered policies to protect them. It looks like Malaysia is playing tug of war with the refugees; allowing them to stay in the country when they have UNHCR papers but at the same time failing to coordinate with all enforcement agencies to prevent any maltreatment. Even though UNHCR is allowed to operate in Malaysia in order to process the applications for refugee status, the actual weight attached to UNHCR identity papers or documentation is highly questionable. In simple words, UNHCR presence is accepted by the authority but their powers are not consistently recognised.¹¹⁴ Malaysian authority in its actions and practice seems to be trying to undermine the UNHCR mandate and is failing to acknowledge as refugees individuals holding such documents. The fact that these refugees and asylum-seekers are living in Malaysia and infringing the immigration laws of the country does not, however, make them a threat to Malaysian security or national and public order.

Discussion in this chapter has shown that there are element of inconsistency, discrimination, uncertainties and marginalisation in the treatment of refugee children in Malaysia. The ways

¹¹⁴ For example the case of *Iskandar Abdul Hamid v PP* (2005) 6 CLJ 505 as discussed in 3.4.

refugee children are handled have also caused anxiety since there is threat to their freedom and enjoyment of rights. This study is of the view that the protection of refugee children should be rights based and not political to ensure uniformity and reliability

4.3.1 Inconsistent Treatment and Discrimination

Malaysia's response to and treatment of refugees in general including children is a mixture of sympathy, openness, support, discrimination, anger and rejection. It has been shown in this chapter that refugees are openly accepted with sympathy in the beginning but when their presence and problems seemed endless and collateral problems started to sprout, Malaysians launched an opposite reaction. Rejection at borders, denial of freedom of movement, detention, abuse and discrimination are among the widespread practice. This has been happening during the Indochinese exodus and continues to be engaged against other group of current refugees and can be observed in various sources including media reports, political engagements, and reports of the UNHCR office and independent international human rights bodies. Probably in parallel with the non- recognition of refugee, media reporting of their affairs in Malaysia is very minimum and there was an inclination of featuring the accusations of disease spreading, violence and criminal activities.¹¹⁵ This one sided reports only generate more negative perception among the public.

The four primary refugee regulators in Malaysia are the Immigration Department, Malaysian Royal Police, Volunteers Cop (RELA), and the National Security Council. Each body is vested with specific powers and responsibilities in dealing with refugee but a full and

¹¹⁵ Kiranjit Kaur, 'Media Reporting on Refugees in Malaysia' (2007) UNEAC Asia Papers No. 13,10.

transparent report reflecting their actions and decisions in relation to refugees and refugee children are not available apart from complaints made about the mistreatment of refugees. Overseeing the right of refugees is SUHAKAM but its role in securing the rights and status of refugees is inherently limited has limited influence on the government. After a long experience of hosting refugees, it is fair to say that Malaysian authority and its legal framework remain 'cold' and 'unfriendly' towards refugee children despite its pledge as a state party to the United Nations Convention on the Rights of the Child (CRC).

The underlying problem with the treatment of refugee children in the Malaysian jurisdiction is the inconsistency of government responses. This is clearly shown for instance in the treatment of the Filipino refugees and the refugees from Myanmar. While the Filipino refugees are provided with several settlement areas equipped with small houses/ hut and granted passes that allowed them to work in Sabah, the Myanmar refugees receive no such assistance. There are certainly significant differences in the treatment of refugees and the most glaring is the durable solution provided. Being located in South-east Asia, where ethnicity is often the catalyst for persecution and thus refugee movement,¹¹⁶ Malaysia is exercising its discretion to provide shelter and settlement for refugees with great caution. It particularly does not want to upset the already delicate balance between ethnic Malays and Chinese. This approach has thus, affected the decision to refuse local integration for refugees from Indochina and yet to accept and allow Muslim Cambodian and Filipino refugees to resettle in the country. Malaysia's response to asylum-seekers from Indochina, the Philippines, Indonesia and

¹¹⁶ As can be seen, refugee movement from Indochina, Southern Philippines and Myanmar are ethnically and religiously motivated.

Myanmar are characterised by difference and discrimination. Even though Malaysia has been more tolerant towards Muslim refugees than non-Muslims, its reaction to the Acehnese and Rohingyans, who are Muslims, are particularly different than the Filipinos and the Cambodians. The Acehnese and Rohingyans were not granted the same freedom as the Filipinos whose presence has lent certain strength to the economic activities in Sabah and contributed to the re-energising of specific political parties.

The treatment of the Indochinese may not be directly relevant for the current situation but it is important in assisting us to comprehend Malaysia's response to a group ethnically different from the current groups and the country's stand with regard to its international obligations and the prospect of CRSR ratification. The standard and the kind of treatment accorded to the Indochinese refugees were evidently different from those given to the rest of the refugee groups. While the Indochinese refugee children were kept confined in camps and provided with food, the Filipino refugees and their children were given a special site to occupy. The other groups of refugee children were allowed to move freely – but in destitution, without food and healthcare access.

Ostensibly, the Indochinese refugee had enjoyed to a certain extent the right to a standard of living adequate for health and well-being.¹¹⁷ The refugee children of the boat people received a certain degree of special protection and were reasonably well taken care of by being provided with the basic human rights: food, shelter, healthcare and education. The Filipino

¹¹⁷ UDHR, Article 25.

refugees are provided with shelter funded by the UNHCR, are free to move and their parents are allowed to work, enabling them to support their own basic needs. Their condition, if not as good as it might be, is better than that of the Rohingyans who have to find work illegally to make a living.

The difference in the response of the government towards various refugee groups and the variation in their treatment can be linked to race, religious ties and, most importantly, political interests. It is political interests that have secured the generous treatment for Filipino refugees in Sabah. From a broader perspective it is unfortunate that the Filipino refugees were exploited as a strategy to strengthen the position of a political party and to benefit the ruling party in the election.

4.3.2 Uncertainties and Marginalisation.

Uncertainty is unmistakably another feature of the treatment of refugee children. Refugees who hold the UNHCR identification papers cannot be certain that they are fully safe from detention especially when during raids. The directive of the Attorney General not to prosecute refugees with UNHCR papers is sometimes denied and overlooked. In addition to that, they are also at risk of deportation and when deported, their chance of being safely returned to their country of origin cannot be ascertained. The uncertainty is a side effect of absence of law.

Another negative effect of absence of law is marginalisation. There is profound evidence leading to the belief that these children are being marginalised not only under the law but also

in the practice of the Malaysian authority, its agencies and the larger community as the result of non- protection or absence of law. It is commonly known that absence of law will consequently bring about discretionary practice on the part of the authority which can be arbitrary and contrary to the principle of human rights and the accumulative effect would be collective marginalisation of the group in the society. These undeserved treatments are further perpetuated by law provisions and practice that neither have regards to the needs of a child in that difficult situation nor the rights of a child in general. This situation have caused the children's temporary period of refuge in the country to be legally and socially challenging and add further distress to their already traumatised past and this should be avoided.

Regardless of Malaysia's humanitarian gestures towards refugee children and the long running work of the UNHCR and other relief organisation, refugee children will be persistently marginalised from the society because their status and position under the law remain invisible and has never been judicially considered. It is contended that the existing arrangement between the Malaysian government, the UNHCR and works of the NGOs is generally unable to guarantee that a person's status as refugee and asylum seekers registered with the UNHCR will protect them from harm committed by state authorised agencies and non- state actors. The recent submission made in conjunction with the much debated arrangement between Malaysia and Australia is another example of lack of trust that commentators have towards refugee treatment in Malaysia taking into account Malaysia's position as a non- contracting state and the contents of the operational guidelines that is non-

binding.¹¹⁸ Many believed that such arrangement has little benefit for the refugees and could further put their safety at greater risk than keeping the refugees in Australia.¹¹⁹

4.3.3 Temporary Refuge.

Ever since the boat people diaspora, Malaysia retains the policy of admitting refugee on temporary basis. This stand is partly motivated by security, financial and social reasons. Moreover, Malaysia's stand to grant only temporary refuge can be perceived as a technique to compel other countries to share the burden of providing protection and finding solution to refugees.¹²⁰ As shown earlier, being granted temporary refuge without proper protection has made refugee children a vulnerable group. They know that they are at risks of being abused by the authorities as well as the community. As such, many of them are constantly living in a state of fear of raids and being arrested and detained.¹²¹ Restrictions and detention warnings imposed on refugees have caused them to remain in hiding and become extremely cautious; these results in children not allowed to stay outdoors to avoid problems with the authorities and the locals. This is expected and unavoidable but an unhealthy practice, since many of these children are living in packed accommodation or in places already unsuitable for their

¹¹⁸ See Susan Kneebone, Maris O' Sullivan and Tania Penovic, "Submission To Inquiry Into The Agreement Between Australia and Malaysia on the Transfer of Asylum Seekers to Malaysia" (2011, Castan Centre For Human Rights Law, Melbourne)

¹¹⁹ See Susan Kneebone, Maris O' Sullivan and Tania Penovic, "Submission To Inquiry Into The Agreement Between Australia and Malaysia on the Transfer of Asylum Seekers to Malaysia" (2011, Castan Centre For Human Rights Law, Melbourne) 5-6.

¹²⁰ Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime" (2000) 94 Am. J. Int'l L 279,- 306, 282.

¹²¹ Alice Nah , "Refugee and Space in Urban Areas in Malaysia" (2010) 33 FMR 29- 29; Amnesty International, 'Abused and Abandoned: Refugee Denied Rights in Malaysia' (*Amnesty International*, 15 June 2010) ASA28/010/2010, 13-14 <<http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16>> accessed 14 Sept 2010; and Women's Refugee Commission, 'Desperate Lives: Burmese Refugee Women Struggle to Make a Living in Malaysia' (2008), available at: <<http://www.refworld.org/docid/490719042.html>> accessed 24 Dec 2011.

health, safety and development. They also choose to live in the jungle sites away from local community.¹²²

4.3.4 Politically Driven, not Rights Based.

[The authorities' actions regarding refugee children in Malaysia are politically driven and these are reflected in the different treatment for different group, at the same and different time and different place. While the authorities rejected many boatpeople for security reasons, complaints by the people of Sabah of the security threat posed by the Filipino refugees was not properly addressed. The denial of the rights of refugee children in education for instance, indicates that government actions are not rights based and not committed to uphold children's rights. This approach has led to actions and decision that negatively affect refugee children's enjoyment of their rights.

The denial of primary and secondary education by limiting access and imposing regulations that cannot be easily surmounted is a serious predicament. At the very least, denying refugee children the right to education will only perpetuate their poverty and destitution. It has been strongly advocated that it is through education that refugee children (mostly living in destitution) will be able to break the cycle by making themselves capable of acquiring ways to participate in the community. This is because education not only opens up opportunities for employment that enables individuals to obtain basic needs, but is also a tool for individuals to make a contribution to society, thus giving them a sense of self-worth. Seeing education for refugee children from a development perspective as well as human rights perspective should

¹²² Alice Nah , "Refugee and Space in Urban Areas in Malaysia" (2010) 33 FMR 29- 29; and Amnesty International, 'Abused and Abandoned: Refugee Denied Rights in Malaysia' (*Amnesty International*, 15 June 2010) ASA28/010/2010, 13-14 <<http://www.amnesty.org/en/news-and-updates/report/refugees-malaysia-arrested-abused-and-denied-right-work-2010-06-16>> accessed 14 Sept 2010.

help Malaysia realise this, as it has been using education to combat and reduce poverty for its own community. The authorities should have foreseen that the uneducated generation that will be created by this marginalisation is exactly what the national and international community wish to prevent.

Having seen their suffering, it is disappointing that the Malaysian authorities do not demonstrate serious concern for the protection and welfare of children once they arrive in the country, especially as the government is aiming to make Malaysia a developed nation by the year 2020. At the very least it is reasonable to expect that as a state party to the CRC, Malaysia should have formulated specific arrangements for children to address various complications that may arise when refugee children reach Malaysian shores. The absence of such arrangements can be construed as the manifestation of the country's priorities, which do not include children. If children are not given protection at the first point of contact or entry, there is little hope that they will be officially and legally protected to any extent beyond that. That is why any other actions and decisions that are inconsistent with children's rights are left as they are.

Bearing in mind the big gap in the protection of human rights in the Malaysian legal system, the present situation of refugee children in the country, and the treatment afforded to them, it is foreseeable that finding a durable solution for refugee children in Malaysia will come down to only one choice: resettlement in third countries, mainly in the West. This is in fact the only durable solution that can be worked out by the UNHCR office for refugee children, regardless

of their attachment to the country from a cultural and religious perspective, since it is unlikely that the vast majority of the refugees could return to their country in the foreseeable future and they are not permitted to stay long enough to be integrated into the local community. In this respect, it is clear that the best interests of the refugee children have been jeopardised and this strikes at the heart of the CRC, which requires States Parties to ensure that in all actions undertaken concerning children the BIC shall be the primary consideration. Malaysia's failure to consider the BIC in its legal framework has subsequently affected the work of the UNHCR office and most importantly, it will have an adverse effect on the children.

The current structure for dealing with refugee children is based on three schemes: the written law, policy and the UNHCR mandate. This structure has allowed written laws or acts of Parliament to compete with ministerial directives, exercised at the discretion of the government, and the power of the UNHCR, which is itself not fully recognised and honoured by the Malaysian government. It is clear that these three systems cannot exist concurrently as written law will always prevail and thus easily defeat the purpose of whatever policy is introduced by the government or any mutual understanding between the government and the UNHCR. The effect is manifested in the arrest, detention and deportation of refugees recognised by the UNHCR despite repeated assurances that they will be allowed to stay temporarily.

4.3.5 Deteriorating Condition

In addition to the current questionable condition, significant concern exist about the likelihood that the treatment of refugees and refugee children will slide from bad to worse based on the available facts and current development in the administrative and judicial practice.¹²³ There is no doubt that the improvement of the situation of refugees relies on substantial progress in national law and practice of the authority.

From administrative perspective, two aspects appear to support this apprehension. The first one is the unjust and unlawful practice of the immigration department in the deportation of persons to a territory where the persons are likely to be subjected to torture, cruel, inhuman and degrading treatment. This is contrary to the principle of *NR* regulating the return of persons to any state where they could face persecution.¹²⁴ Many instances of deportation of refugees and asylum seekers can be found in the media and the reports of the UNHCR, Human Rights Watch, Amnesty International, Suara Rakyat Malaysia (SUARAM), International Federation for Human Rights (FIDH) and SUHAKAM.¹²⁵ One such example is

¹²³ This refers to the Immigration Court.

¹²⁴ The presumption is that Malaysia is bound by the principle of *non-refoulement* under the customary international law. Further discussion on the customary status of the rule and whether Malaysia is in fact bound by the rule or could claim itself as persistent objector to the rule will be made in Chapter 2.

¹²⁵ See for instance ___, 'Malaysia Deports 130 Thai Muslims Asylum Seekers' (Red Orbit News, 17/1/2006) <http://www.redorbit.com/news/dsisplay/?id=359441> accessed 14 Apr 2008; Amnesty International, 'Malaysia Human Rights at Risk in Mass Deportation of Undocumented Migrants' (Report) (12/2004) AI Index: ASA 28/008/2004, p. 6-9; Human Rights Watch, 'Malaysia: Disband Abusive Volunteer Corps' (Human Rights Watch, 9 May 2007) http://hrw.org/english/docs/2007/05/08/malays15885_txt.htm accessed 16/4/2008; Human Rights Watch, 'Living in Limbo Burmese Rohingyas in Malaysia' (Report) (Human Rights Watch, Aug 2000) <http://www.hrw.org/legacy/reports/2000/malaysia/index.htm#TopOfPage> accessed 23 June 2008; USCRI, 'World Refugee Survey 2009' (Report) <http://www.refugees.org/countryreports.aspx?id=2360> accessed 12 Nov 2010; and FIDH & SUARAM, 'Undocumented Migrants and Refugees in Malaysia: Raids, Detention and Discrimination' (Report) (International Federation for Human Rights, 19 March 2008) <http://www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf> accessed 15 Nov 2008.

the deportation of Mohamad Iqbal Abdul Rahman and his wife to Aceh in 2004 by the Immigration Department despite the re- hearing of his case at the High Court is still pending after an order of re- hearing was made by the Court of Appeal. Both of them were declared ‘prohibited immigrant’ under section 8 of the Immigration Act 1959/63.¹²⁶ The action is an illustration of how Immigration Department can deliberately disregard court order when dealing with deportation.¹²⁷

The second aspect is associated with the relationship between the authority and the UNHCR. The situation is rather thorny as the authority continuously and deliberately refuse to acknowledge the role of UNHCR in protecting and assisting refugees and asylum seekers¹²⁸ and at times having doubt over UNHCR’s integrity in refugee determination process including accusing UNHCR for indiscriminately issuing illegal immigrants with refugee status. As the protector of the refugees, UNHCR’s mandate in processing refugee application and recognising applicants as refugee is not fully respected in the country. Many recognised refugees are arrested, detained and deported even when they show their UNHCR identity

¹²⁶ See ___ ‘Court Rules Mohamad Iqbal’s Deportation Unlawful’ BERNAMA 21 May 2004, at <http://findarticles.com/p/news-articles/bernama-malaysian-national-news-agency/mi_8082/is_20040521/court-rules-mohamad-iqbals-deportation/ai_n51469394/> accessed 20 Jun 2010; and ___ ‘Immigration Department Reminded Not To Be “Overzealous” On’, BERNAMA 24 June 2008, at http://findarticles.com/p/news-articles/bernama-malaysian-national-news-agency/mi_8082/is_20080624/immigration-department-reminded-overzealous/ai_n51587909/?tag=rel.res1 accessed 20 Jun 2010.

¹²⁷ It is also highly questionable on whether the court could hold the Department of Immigration liable for contempt of court in this case.

¹²⁸ ___, ‘UNHCR’s Role Comes Under Fire’ *New Straits Times* (Kuala Lumpur, 2 Feb 2007) 12 in which the Minister of Home Affairs claimed that the UNHCR is interfering with the duty of the authority in cracking down illegal immigrants with their work of recognising refugees.

cards which identify them as refugees.¹²⁹ The authority's determination to ignore UNHCR identity papers and plan to arrest illegal migrants including those recognised as refugees is reflected in a statement made by a minister¹³⁰ and this is in fact a case of 'disrespect' and failure to honour Malaysia's obligation.

In practice, refugees (or illegal immigrants according Malaysian law) found to have overstayed or having no valid travel document are charged and subject to speedy trial at the specially set up Immigration Court which have no regards for the rights of refugees or the principle of fair trial.¹³¹ Hence, there is a need to urgently address the current concern on the protection of internationally displaced children in Malaysia and the foreseeable negative impact that can result from the failure to acknowledge and implement Malaysia's obligation in international law and to improve the national legal framework.

¹²⁹ See David Yeow, 'Refugees Plead for Kinder Treatment' *New Straits Times* (Kuala Lumpur, 21 June 2008) 21; and __, 'Boys Held Despite Having Documents' *New Straits Times* (Kuala Lumpur, 21 June 2008) 21

¹³⁰ Bernama, 'Najib: For Malaysia to decide and Not UNHCR' *Daily Express News* (Sabah, 4 March 2005) <<http://www.dailyexpress.com.my/news.cfm?NewsID=33021>> accessed 3 Nov 2010;

¹³¹ The Malaysian Immigration Court sits at the Session Court and was established in 2006 with the aim to speed up trials of immigration related offences but its practice is subject to strong criticism from legal practitioners and human rights advocates. Apart from being held at immigration detention centre which are not easily accessible, the prosecution in the immigration court are usually carried out against non-citizen without the assistance of an interpreter that could help the accused to understand the charge read to them. See Amnesty International, 'A Blow to Humanity: Torture by Judicial Caning in Malaysia' ASA28/013/2010 (Amnesty International, 6 Dec 2010) 14 <<http://www.amnesty.org/en/library/asset/ASA28/013/2010/en/199a43b6-c204-4414-9cf6-bec6f6ac380e/asa280132010en.pdf>> accessed 10 Dec 2010; Latheefa Beebi Koya commented on the irregular trial procedure in the court in "Comment: A Court Within A Camp- Malaysia Welcomes The World" (Malaysian Bar, 14 March 2007) <http://www.malaysianbar.org.my/members_opinions_andcomments/comment_a_court_within_a_camp_Malaysia_welcomes_the_world.html> accessed 13 Jan 2010. In *Public Prosecutor v Ina* [2009] 6 MLJ 431, 436; the High Court stated that the case which applied for revision was indeed a miscarriage of justice at the Immigration Court level. The respondent was charged under section 6 (1) (c) of the Immigration Act 1959/63 Immigration Act 1959/63 for entering Malaysia without valid pass and paid her compound at the Immigration Court but was nevertheless sentenced to 10 months' imprisonment. It was later found out that she in fact owns a valid Indonesian passport.

In view of the questionable and disputed practice when dealing with refugee children in its jurisdiction for decades, it is vital and just for Malaysia to turn its attention towards the betterment of refugee children's status by looking at the possible and workable legal solution which can be found in international law especially under the CRC where state obligations and children rights are provided side by side. As a member of the United Nations and various other international organisations it is in Malaysia's interest to ensure the compliance of its law and practice to international law and standards.

4.3.6 The Application Of The Principle Of BIC

Lastly, the legal framework allows limited room for the application of the principle of BIC. It shows that the application of the principle by the UNHCR and the authority are very limited. We know that UNHCR introduced various guidelines to be followed by its personnel but UNHCR's conduct is restricted by legal and administrative environment in the country. Its option in finding durable solution is constrained to repatriation, or return and resettlement. On one hand, however, voluntary repatriation is almost impossible as the conditions in the children's countries of origin – such as Myanmar – are not improving; and resettlement to third countries might take years.

On the other hand, local integration is never an option either, for it was only offered at the discretion of the government in highly exceptional circumstances and was never made into a

precedent. The current group of refugee children is only considered for resettlement in a third country, without making the BIC as a primary consideration, because it is not possible for the UNHCR to do so in the light of the circumstances in Malaysia. In fact, the principle of BIC guaranteed under Article 3 is sadly not a primary consideration in every stage of refugee cycle in Malaysia. Consequently, this makes their temporary refuge in Malaysia filled with neglect and deprivation.

4.4 CONCLUSION

This chapter has given an account of the situation, the plight and the kind of treatment that refugee children received in Malaysia. The treatment are characterised by three elements: uncertainty of status; inconsistency of treatment; and violation of rights. The uncertainties can be traced from the way authorities deal with UNHCR card-holders who are detained and charged in court. The inconsistencies are demonstrated by the- different treatment accorded to different groups of refugees. Constant refusal to ratify the CRSR, redirecting boats of asylum seekers and failure recognise the role of UNHCR and the cards issued to refugees are manifestation of rejection. Nevertheless, it is clear that Malaysia's decision to allow refugee to remain in the country is the result of its sense of obligation to fulfil its international obligation.

Such inconsistencies and uncertainties have made it apparent that minor asylum-seekers and refugees in Malaysia are in fact in a vulnerable condition and they are not treated as refugee first, instead, they are treated as migrants first and children second. The position and treatment of the current refugee groups are generally below the international standard, with basic rights

such as access to healthcare, the right to education, the right to family life, protection from discrimination and the ignorance of the principle of best interest forming the crux of the problems. Refugee children within the refugee community are thus deprived of their rights as children as well as their rights as refugees. Despite the inconsistent and uncertain practices, Malaysia never denies its obligation in international law for example when rejecting refugees, but merely stated that Malaysia is not bound by the CRSR. Its usual excuse is economic and financial reasons and this should be treated as failure to comply or violation of duties rather than as objection of responsibility or obligation in international law.

The result of the exploration in this chapter has also helped to identify and point out major mistreatment of refugee children, denial of their rights and the effect of such denial. These highlights demonstrate the pressing need to find a workable solution to promote better conditions and protection of the refugee children. It is now established that unless the law is changed or reformed, the condition of refugee children in this country will remain in a substandard position. Part of the effort is to provide protection under the customary international law; the *non-refoulement* rule and the principle of the best interests of the child. Next in Chapter 5, the focus of discussion is the customary status of the *NR* rule in which the two elements of the formation of the CIL will be applied to the principle of NR.

CHAPTER 5

CUSTOMARY STATUS OF THE PRINCIPLE OF *NON-REFOULEMENT*

5.1 INTRODUCTION

A widely discussed customary rule in refugee law is the protection against *refoulement* or return, a cornerstone of refugee protection. The principle is also a well-established norm in the protection of human rights.¹ The practice of states accepting refugees, protecting them and not returning them to a territory where their lives and freedom might be threatened is said to have become a customary law when the two elements of customary legal rules were proven. It is important to note that the principle of *non-refoulement* is also a component of protection in the prohibition of torture, which is a peremptory norm of international law or *jus cogens*. Thus, persons claiming protection against torture shall be treated in accordance with the principle of *NR*. The objective of this chapter is to analyse the formation of the principle of *non-refoulement*. It first describes and analyses whether there is strong support from scholars for the creation of the rule. Then it explains the scope and content of the principle and states' duties arising out of the principle. Next, it looks at how states can exempt themselves from operating the principle by persistently objecting to the rule.

¹ UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (UNHCR, Geneva 2007) 19 < <http://www.refworld.org/pdfid/45f17a1a4.pdf> > accessed 20 Jan 2010.

5.2 THE FORMATION OF THE PRINCIPLE OF NON REFOULEMENT INTO INTERNATIONAL CUSTOM.

This principle is expressed in various ways, and Lauterpacht and Bethlehem, after examining different provisions of *non-refoulement* in various instruments, extract the principal essence of the rule and outline the core content of the protection under customary international law.² It is an established principle that a similar rule can exist in the form of customary law and treaty law simultaneously.³ There is also judicial support for the notion that a customary rule can crystallise out of a provision of a treaty if it satisfies three conditions: i) fundamentally norm-creating character; ii) widespread and representative state support including affected states; and iii) consistent state practice and general acceptance and recognition of the rule.⁴

Support for the customary status can be found in legal commentaries as well as conferences.⁵ A number of scholars, including Lauterpacht, Bethlehem, Goodwin-Gill, Hailbronner, Mushkat, Stenberg and Allain, have espoused the idea that the principle has become a customary rule over time.⁶ The requirement of general and uniform state practice and the sense of obligation are inferred from various actions of states around the world.

² Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 31-54.

³ *North Sea Continental Shelf*, Judgement, ICJ Reports 1969, 3 at para 64, 70-4; *Nicaragua v United States of America*, Judgement, ICJ Reports 1984, 392 at para 73.

⁴ *North Sea Continental Shelf*, Judgement, ICJ Reports 1969, 3, at para 72-4.

⁵ The International Institute of Humanitarian Law has also declared the customary status of the *non-refoulement* principle. See IIHL, '25th Round Table on Current Problems of IHL: San Remo Declaration on the Principle of Non-Refoulement' 2001.

⁶ Goodwin-Gill, G. S., and McAdam, J., *The Refugee in International Law* (3rd Edition, Oxford University Press, Oxford 2007) 345-54; Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee*

The following practices are presumed to have met the requirements of generality and uniformity of state practices of *non-refoulement*:

5.2.1 States' Ratification And Accession Relevant International Or Regional Instruments

States' ratification and accession to one or more international or regional instruments that embody the rule of *non-refoulement* including the CRSR, ICCPR, CAT, ICESCR, European Convention of Human Rights (ECHR), OAU Refugee Convention, and the American Convention of Human Rights 1969 (ACHR).⁷ This is not applicable to Malaysia as it is not a state party to any of the instruments, but it was already a member of the UN when the Declaration of the Territorial Asylum was adopted by the General Assembly unanimously in 1967.

5.2.2 States' Membership Of International And Regional Organisations

States' membership of international and regional organisations that adopt non- legal documents containing provisions of *non-refoulement* effect.⁸ This shows that member states

Protection in International Law' (Cambridge University Press, UK 2003) 64-70; Gunnel Stenberg, Non-Expulsion And Non- Refoulement (Iustus Forlag, Uppsala 1989); Roda Mushkat, 'Mandatory Repatriation Of Asylum Seekers: Is The Legal Norm Of Non-Refoulement 'Dead'?' (1995) 25 (1) HKLJ 42-51; Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 538; and Seline Trevisanut, The Principle Of Non-Refoulement At Sea And The Effectiveness Of Asylum Protection' In Max Planck UNYB 12 (2008) 205-246;

⁷ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law*' (Cambridge University Press, UK 2003) 68.

⁸ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law*' (Cambridge University Press, UK 2003) 68.

are aware of the rule and support its customary status. Malaysia is a member state of the AALCO, which adopted the Bangkok Principles, a non-binding document concerning refugees.⁹

5.2.3 States' Incorporation Of The Said Treaties Into Municipal Laws

States' incorporation of the said treaties noted above into municipal laws either by adopting the whole treaties, or legislating the rule into constitutions, or enacting legislations that incorporate provisions of the treaties, especially the principle of *non-refoulement*. More than 120 states have incorporated the *non-refoulement* provisions in their municipal law. Malaysia is one of the very few states not to have made the rule part of its law but this does not invalidate other acts.

5.2.4 States' Physical Practices Of Not Rejecting, Removing And Returning Refugees

States' actual practices of not rejecting, removing and returning refugees within their territory to a frontier where the refugees will be persecuted or their lives and liberty placed at risk of persecution, torture or any inhumane and degrading treatment. This includes their practice in relation to extradition. This part of the argument is perhaps the most controversial because, despite their compliance with the rule of *non-refoulement*, many states nevertheless *do* act

⁹ Article III of the Bangkok Principles provides as follows:

1. *No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.*
The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person's presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.
2. *In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.*

against the principle and justify the breach and violation by citing security, social and economic reasons. For instance, states adopt restrictive legal measures that indirectly prevent persons in need of international protection from entering a safe territory where they can apply for asylum. In mass influx situations, states have deliberately closed their borders to asylum-seekers. Security and economic shortages are the two most common explanations for their negative actions. Nevertheless, none of these states have cited non-obligation or denied their responsibility under the rule of *non-refoulement*. The various forms of violation will not, however, vanquish the consistency and uniformity of *non-refoulement* practice.

5.2.5 Judicial Decision As State Practice

Judicial decisions are conduct of the judiciary which are official state practice. In *Alzery v Sweden*,¹⁰ an order for immediate expulsion of an author was made after the Swedish authority received assurances from the Egyptian government that the author would be given a fair trial and not be subjected to torture or inhuman treatment or punishment of any kind or be sentenced to death. The Swedish government considers the assurance as sufficient and thus would not amount to violation of its responsibility and obligation under the *non-refoulement* rule. However, it was decided that the Swedish government has failed to review the risk of torture that may cause irreparable harm to the author and thus has not done enough to comply with its obligation not to expose individual to real risk of torture.

¹⁰ (2006) 24 BHRC 87.

In *Abdulla and others v Germany*¹¹ the principle of *non-refoulement* had to be interpreted as to mean that refugee status would cease to exist when, the persecution, no longer existed and there was no other reason to fear other persecution. The competent authorities must verify the change of circumstances, that the persecution has been prevented and that an effective legal system to detect, prosecute and punish the persecutor is in place.

In *MA v Cyprus*¹² it was held that an order for deportation should be suspended pending appeal of the rejection of asylum application or else the deportation will be in violation of the NR rule. In *Soering v. United Kingdom*¹³ it was held that an extradition order to face cruel, inhuman or degrading treatment, which could arise from the imposition of the death penalty in certain circumstances, would be contrary to the spirit and intention of Article 33. In a Kenyan case, *Kituo Cha Sheria and Others v Attorney General*,¹⁴ the court reiterated that the principle of *non-refoulement* was the cornerstone of refugee protection and had gained the status of international customary law.

In *Dang*¹⁵ an Ireland case, it was concluded that the Appellant had not shown that he was at real risk of serious harm in Vietnam. In any event, he was excluded from humanitarian protection pursuant to para 339D of the Immigration Rules, having been convicted of a

¹¹ [2010] All ER (EC) 799

¹² (*App. No. 41872/10*) [2013] ECHR 41872/1

¹³ (1989) 11 EHRR 439

¹⁴ [2014] 2 LRC 289

¹⁵ [2013] UKUT 00043 (IAC)

serious crime.¹⁶ In another Ireland case, *FRN (a minor suing by his mother and next friend and another) v Minister for Justice, Equality and Law Reform; O v Minister for Justice, Equality and Law Reform*,¹⁷ the court held that, the Minister is specifically prohibited by the *non-refoulement* principle from expelling non-citizens whose rights to life and bodily integrity would thereby be threatened. In *R (on the application of Etame) v Secretary of State for the Home Department and another; R (on the application of Anirah) v Secretary of State for the Home Department*¹⁸ it was held that where a claim for protection has been considered and rejected and the rejection has been upheld on appeal there is no violation of the principle of *non-refoulement* in removing the person concerned.

An Australian case, *Mzyyo v Minister For Immigration And Citizenship*,¹⁹ the applicant, a citizen of Iran, was found to be a refugee pursuant to s 36(2) of the Migration Act 1958 (Cth) (the Act). However, pursuant to s 501(1) of the Act, the respondent refused to grant the applicant a visa on the basis that he did not pass the "character test" because he had committed criminal offences while in immigration detention. It was held that a person found to be a refugee may not be removed from Australia to a country where he or she faces a well-founded fear of persecution for a convention reason.

¹⁶ *Dang* (Refugee - query revocation - Article 3) [2013] UKUT 00043 (IAC) at para 48

¹⁷ [2008] IEHC 107

¹⁸ [2008] 4 All ER 798

¹⁹ (2013) 141 ALD 580/ [2013] FCA 49

In *M38/2002 v Minister For Immigration And Multicultural And Indigenous Affairs*²⁰ it was decided that if a contracting state removes a person from its territory, there can be no breach on its part of Art 33 if the person is not a refugee (as defined in Art 1) or, if a refugee, the removal does not involve the return to a place where there is a risk to his or her life or freedom on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

In a New Zealand case, Refugee Appeal No 76044,²¹ the appellant was forced into an arranged marriage and suffered from domestic violence inflicted by her violent and jealous husband. Both of them made a refugee claim based on the alleged political activities of the husband but failed on credibility grounds. While waiting for the decision, the husband's mental condition deteriorated to the extent that he attempted to kill her. The appellant made a second refugee claim on the basis of risk of death in an honour killing. There was evidence that the appellant would suffer serious harm if she returns to the country of origin. and Refugee Status Appeals Authority found that the appellant had a well-founded fear of being persecuted. It was concluded that when a refugee claimant has established a well-founded fear of being persecuted the refugee status can only be withheld if that person can genuinely access effective and meaningful protection at the country of origin.

²⁰ (2003) 75 ALD 360,

²¹ [2008] NZAR 719

In *X v Refugee Status Appeals Authority*,²² the Court recognised that any decision on an extradition request concerning a refugee or asylum-seeker must be assessed in compliance with the principle of **non-refoulement**. There is therefore a distinct advantage to the determination of refugee status prior to the final determination of an extradition request. Even though the extradition can trigger the exclusion of the refugee, the risk of refoulement must be assessed prior to the surrender of the person for extradition.

In another case, *Zaoui v Attorney-General* (No 2)²³ the question was whether Art 33 (2) of the CRSR required the decision maker to balance the security threat posed by the relevant person against the threat that person faced if deported. It was held that the two considerations were not related in any proportionate way. The decision was to be made by reference to the security of New Zealand without making any proportional reference for example to the threat to the life of the refugee. The court in *Fables v. Canada (Citizenship and Immigration)*²⁴ it was concluded that a host country is allowed to expel a refugee who has been "convicted by a final judgment of a particularly serious crime" and "constitutes a danger to the community of that country" and the crime refers to crimes committed *outside* the country of refuge. And in *Sittampalam v. Canada (Minister of Citizenship and Immigration)*²⁵ The court has to consider whether the Applicant will face a substantial risk of torture or a risk to life or to a risk of cruel and unusual treatment or punishment upon deportation. It was held that an erroneous assessment of risk facing the Applicant if he is deported and the risk the danger he presents to the public is unreasonable and the should be quashed.

²² [2006] NZAR 533

²³ [2006] 1 NZLR 289

²⁴ [2014] S.C.J. No. 68

²⁵ [2009] A.C.F. no 59/ 2009 FC 65/ 340 F.T.R. 53.

5.2.6 *Opinio Juris*.

As to the obligatory nature of the rule or *opinio juris*, a number of state expressions and statements acknowledging the effect are listed below:

- a. The unanimous view conveyed by state representatives during the UN Conference on the Status of Stateless Persons, which stated that the provision of *NR* in the Convention was taken as a demonstration and representation of a generally accepted principle of non-return.²⁶
- b. The provision of non-return is embodied in various international treaties apart from the CRSR.²⁷
- c. The UNHCR and states around the world continue to protest and object to any breach of the *non-refoulement* principle or any conduct that amounts to *refoulement*.²⁸

²⁶ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 45- 46.

²⁷ The same rule of non-return is also provided under Article III (3) of the Bangkok Principles; Article 3 of the 1967 Declaration on Territorial Asylum adopted by UNGA; Article II (3) of the OAU Refugee Convention; Article 22 (8) of the 1969 American Convention on Human Rights; Section III Paragraph 5 of the 1984 Cartagena Declaration; Article 3 of CAT; Article 7 of the ICCPR; and Article 3 of the 1950 European Convention on Human Rights.

²⁸ Suzanne Gluck 'Intercepting Refugees At Sea: An Analysis of the United States' Legal and Moral Obligations' (1993) 61 Fordham L. Rev. 865-893 (Criticised America's response to Haitian refugees in the early 1990s. Thousands of Haitians fled the political turmoil in Haiti out of fear of persecution but their boats were interdicted and forced to return to Haiti without any determination process to identify genuine refugees. Groups representing the refugees challenged the conduct of the authorities in court for the interdiction and failure to properly consider the claim as refugees); Nils Coleman '*Non-Refoulement* Revised: Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law' (2003) 5 Eur. J. Migration & Law 23-68 (Two case-studies are presented to explain the reaction of the international community when the principle of *non-refoulement* was violated in the Croatia-Bosnia Herzegovina crisis of 1992 and the FYR Macedonia- Kosovo crisis of 1999. Only the UNHCR and other NGOs expressed protests at the violations); and Rita Bettis, 'The Iraqi Refugee Crisis: Whose Problem Is It? Existing Obligations Under International Law, Proposal to Create a New Protocol to the 1967 Refugee Convention, & U.S. Foreign Policy Recommendations to the Obama Administration' (2011) 19 Transnat'l L. & Contemp. Probs., 261-292.(Call for the USA to admit Iraqi refugees who fled during the Operation Iraqi Freedom and to be responsible for the reparation for the harm suffered by the victims of the war).

- d. Article 33 of the Refugee Convention is considered to have a norm-creating character, which also forms the foundation of a customary law.²⁹

Lauterpacht and Bethlehem argue that Article 33 of the CRSR satisfies all the three prerequisites to become a customary rule.³⁰ They provide an extensive discussion of the customary status of the rule and apply the three elements required for the crystallisation of a customary rule from a treaty provision³¹ to the *non-refoulement* principle. They draw attention, first, to the expression of the principle as a norm-creating character in several international instruments³² and a number of Conclusions of the UNHCR Executive Committee (ExCom). The UNHCR Executive Committee provided about 60 Conclusions on the principle of *non-refoulement*, asserting states' responsibilities and compliance with the principle.³³

Second, they assert that there is evidence showing that the principle is already widespread and representative. This is derived from the fact that the principle is contained in many binding

²⁹ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 64- 70. Also see *North Sea Continental Shelf Case*, ICJ Reports (1969) at 41-43.

³⁰ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 64- 70.

³¹ As identified and applied by the ICJ in the *North Sea Continental Shelf Case*.

³² In Article III (3) of the Bangkok Principles; Article 3 of the 1967 Declaration on Territorial Asylum adopted by UNGA; Article II (3) of the OAU Refugee Convention; Article 22 (8) of the 1969 American Convention on Human Rights; Section III Paragraph 5 of the 1984 Cartagena Declaration; Article 3 of CAT; Article 7 of the ICCPR; and Article 3 of the 1950 European Convention on Human Rights.

³³ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 64-65; UNHCR, 'A Thematic Compilation of Executive Committee Conclusions' (UNHCR, 2008) 313-322.

instruments and that, when these are combined, about 90% of all UN members are parties to one or more of these conventions and treaties. Furthermore, there was no evidence of opposition from states who are not party to any of the legal and non-legal instruments.³⁴

The third element, consistent practice and general recognition of the rule, is shown in the participation of states in binding and non-binding instruments, as discussed earlier in the second element. Furthermore, about 80 states have incorporated the principle in their national legislation, and membership of the UNHCR's ExCom is taken as sufficiently representative of states as to constitute generality.³⁵ However, states' support for the principle is not sufficiently and consistently reflected in their actual practice, especially in situations of mass influx. States' actual practices also include contrary exercises that are in breach of the principle. Violations of the principle through deportation, rejection at frontiers and restrictive

³⁴ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 47.

³⁵ The membership of the ExCom is currently composed of 78 members, a gradual expansion from the initial 25 members in 1958 when it was founded. The elected state representatives are from Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Benin, Brazil, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Germany, Ghana, Greece, Guinea, Holy See, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lesotho, Luxembourg, Madagascar, Mexico, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Serbia, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Tanzania, United States of America, Venezuela (Bolivarian Republic of), Yemen and Zambia

³⁵ See US Committee for Refugees and Immigrants, *World Refugee Survey* 2007 and 2008 for reports on deportation of refugees. Also see Ninette Kelley, 'International Refugee Protection Challenges and Opportunities' (2007) 19 IJRL 401- 446; Jean Francois Durieux and Jane McAdam, 'Non-Refoulement Through Time: The Case For a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4; and Nils Coleman, '*Non-Refoulement* Revised: Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law' (2003) 5 Eur. J. Migration & Law 23-68.

application of the law have been reported and deliberated on many occasions.³⁶ Nevertheless, domestic courts have interpreted different provisions relating to the *non-refoulement* principle, recognising such prohibition and rejecting any exceptions and derogation from the rule.³⁷ In fact, there has been strong criticism of a declaration by a court that, in the future, it may be possible to justify deporting refugees to face torture.³⁸

5.2.7 Opposing Views

On the other hand, some commentators dispute the view that *non-refoulement* has reached customary status. Holders of these opposing views, such as Hathaway, insist that, despite decades of refugee problems and acknowledgement of their rights under the 1951 Convention, no custom has ever been established, for several reasons. Firstly, there is a lack of consistent and uniform practice among contracting states.³⁹ In this regard, several instances can be referred to in establishing the negative practices of states, which are contrary to the prerequisite of uniform and consistent practice.⁴⁰ In concluding that there is no customary law of *non-refoulement*, Hailbronner argues that actual state practice, as seen from the asylum

³⁶ See US Committee for Refugees and Immigrants, *World Refugee Survey* for reports on various deportation instances of refugees. Also see, for instance, Jean Francois Durieux and Jane McAdam, 'Non-Refoulement Through Time: The Case For a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4; and Nils Coleman, 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 Eur. J. Migration & Law 23-68.

³⁷ See, for instance, *Soering v United Kingdom* (1989) 11 EHRR 439 ; *Cruz Varaz v Sweden* (1992) 14 EHRR 1, *Chahal v. United Kingdom* (1997), 108 ILR 385, *Ahmed v. Austria* (1997), 24 EHRR 278, *McKinnon v Government of the United States of America* (2008) 4 AER 1012; *Puzan v Ukraine* (2010) ECHR 51243/ 08, *HLR v France* (1997) 26 EHRR 29; *Jabari v Turkey* (2000) BHRC 1; and *Bensaid v UK* (2001) 33 EHRR 10.

³⁸ The Canadian Supreme Court in *Suresh v Canada* (2002) SCC 1.

³⁹ James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge 2005) 365.

⁴⁰ See, for example, discussion on the refoulement by Croatia and FYR Macedonia and the argument to discharge the application of the principle in situation of mass influx, in Nils Coleman, 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 Eur. J. Migration & Law 23-68.

laws and actions of Western Europe, the USA and Canada, has constituted contradictory evidence against customary status.⁴¹

Secondly, it is claimed that the principle will not easily reach customary status because the rule is against states' desire to maintain control over their own borders; in other words, it is contrary to states' idea of sovereignty. The rule will impose on states an obligation to accept aliens into their territories or will remove states' powers, while states insist on their prerogative to allow or disallow entry.⁴²

The next counter-argument contests the sufficiency of clear proof. The attainment of customary status is not sufficiently convincing as there is inadequate evidence to support the proposal. This argument takes into consideration all the inconsistent practice that has been occurring for decades to this day. The idea of the customary status of the *non-refoulement* principle and its recognition is regarded as wishful legal thinking rather than a careful factual and legal analysis.⁴³

⁴¹ Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985-1986) 26 Va. J. Int'l L 857, 858.

⁴² Kay Hailbronner, 'Non- Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985- 1986) 26 Va. J. Int'l L 857, 872.

⁴³ Kay Hailbronner, 'Non- Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985- 1986) 26 Va. J. Int'l L 857, 872.

5.2.8 Negative and Inconsistent State Practice as Violation Rather than Denial of Obligation

A few examples of state practice that violate the principle can be examined to show that many states simply break the rule despite realising their obligation in international law. We shall take a number of regional cases as samples. In Asia, a classic example of *refoulement* occurred during the Indochina crisis when Thailand, Malaysia, Indonesia, Singapore and Australia were all criticised for refusing to allow refugees to land and disembark on their shores despite appeals and the evidently poor condition of the refugees and their boats/vessels. As discussed earlier in Chapters 1 and 2, Malaysia was also criticised for rejecting refugees from Myanmar, Indonesia and the Philippines. Malaysia's refusal to allow boats to land and disembark and its redirection of the Indochinese boats to Indonesia do not amount to a violation of the rule of non-*refoulement* if the boats are redirected to a safe country.⁴⁴

The *Tampa* incident in Australia is one of the best known incidents of *refoulement*. A Norwegian freighter carrying Afghanistan refugees whom the crew had rescued on the high seas was not allowed to dock despite concern over the welfare and health of the refugees as well as the crew. The incident attracted responses from the international community and has led to the introduction and enactment of a series of new laws by the Australian House of

⁴⁴ See discussion in Rachel Mansted, "The Pacific Solution - Assessing Australia's Compliance with International Law," (2007) 3 (1) Bond University Student Law Review 1, 5.

Representatives to validate the Australian actions.⁴⁵ During the course of the incident, Australia never denied its responsibility not to *refoule* the refugees despite continuously asserting that the refugees should not be allowed to apply for political refugee status and should not enter Australia illegally, and arguing that the protection against return only applies to those who are already present in states not in this situation where asylum seekers are still at sea.⁴⁶

The United States of America is no exception, as it *refouled* Haitian and Cuban refugees, accusing them of being economic migrants.⁴⁷ One significant example from Europe was the Macedonian government's closure of its borders to refugees from Kosovo⁴⁸ during the crisis in Yugoslavia. Here, the Macedonian authority justified its actions by citing problems of resources and unstable ethnic balance.⁴⁹ It appears that none of these states denied their obligations under the principle of *non-refoulement*. In such cases, this study proposes that the states' actions are merely breaches or violations of the rule rather than expression of rejection of the rule of *non-refoulement*.

⁴⁵ Tara Magner, 'A Less Than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 IJRL 53- 119; Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15 IJRL 159- 185; and Alice Edwards, 'Tampering With Refugee Protection: The Case of Australia' (2003) 15 IJRL 192- 218.

⁴⁶ Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15 IJRL 159, 169,

⁴⁷ Suzanne Gluck 'Intercepting Refugees At Sea: An Analysis Of The United States' Legal And Moral Obligations' (1993) 61 Fordham L. Rev. 865-893;

⁴⁸ Nils Coleman 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law' (2003) 5 Eur. J. Migration & Law 23-68.

⁴⁹ Nils Coleman 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law' (2003) 5 Eur. J. Migration & Law 23, 33.

5.2.9 Incorporation of *Non-Refoulement* Provision in Domestic Law as State Practice.

The next argument to rebut the opposition's claims is that they have failed to consider the practice of incorporating the principle into domestic legislation as part of general practice. Proponents of *non-refoulement* have argued that the incorporation of the principle into municipal laws is also the *opinio juris* of the state to demonstrate that the principle of *non-refoulement* is in fact an obligation under the law. However, this argument was not considered by dissenting commentators. Instead, these commentators take into account only the actual state practice in dealing with refugees, such as the conflicting practice in the areas of return, border closure, rejection and deportation by many countries that are faced with a situation of mass influx but fail to take other obvious practices into account.

5.2.10 Analysis

However, there are apparent difficulties in the arguments of these opposing views. The proposition of customary status counted the adoption and incorporation of the principle in domestic legislation as 'state practice'. Incongruent practices by states are perceived as violations and breaches of the principle rather than 'inconsistent' state practice that would undermine the element of customary international law.

From the above argument, by comparison, there are two significant, consistent state practices: first, becoming members of instruments that contain protection against return; and, second, the incorporation of the principle of *non-refoulement* into national laws as opposed to resorting to the intermittent application of forced return. The number of states that

consistently practise the rule is greater than the number of states that carry out practices that are in breach of the principle. These incompatible practices are insufficient to dismiss the consistency and generality of the *non-refoulement* principle; instead, these contradictions shall be construed as deliberate infringements of the rule for unlawful reasons, even where states do view the principle as legally obligatory. Hence, this study takes the view that the customary law of *non-refoulement* does exist in the form or content set out by Lauterpacht and Bethlehem.

The fact of being recognised as customary international law will allow the principle of *NR* to be applicable to everyone whose return to a territory would risk their persecution, torture, cruel, inhuman and degrading treatment or punishment, and pose a threat to their life and liberty regardless of their refugee status or the state's status in treaty ratification. Thus, a person who has failed to claim refugee status under the Convention or has no treaty to turn to is still entitled to protection against *refoulement* under customary international law.

5.3 NON-DEROGABILITY OF THE *NON-REFOULEMENT* PRINCIPLE OR THE *JUS COGENS* NATURE

A number of commentators are also of the view that the principle of *non-refoulement*, apart from being customary, cannot be set aside or ignored by states in any way, as it has become a rule of *jus cogens*. The consequence of being a *jus cogens* rule is that the rule cannot be breached or violated for any reason, and any kind of derogation from the rule is prohibited.

This discussion on the *non-refoulement* principle as peremptory norm is highly relevant as it will affect Malaysia in a situation where the persistent objector rule is to be invoked. As discussed in Chapters 1 and 2, Malaysia has maintained its stance on refugees, including references to the limitations of its resources and security issues pertaining to the group.

It is very likely that Malaysia will claim exemption from the *non-refoulement* principle using the persistent objector rule if an application is made in the Malaysian courts to compel Malaysia to fulfil its obligation towards refugees under the rule. States can only rely on the success of the persistent objector claim to evade the binding force of any customary rules. However, a counter-measure is invented to overcome states' evasion of international responsibilities. In principle, nothing escapes the customary rules with *jus cogens* status. No state can reasonably invoke the persistent objector rule against a peremptory norm in international law. As a result, if the *non-refoulement* principle is found to have gained *jus cogens* status, Malaysia will not be able to benefit from the persistent objector rule.

By virtue of Article 53 of the Vienna Convention on the Law of the Treaties (VLT),⁵⁰ the principle of *non-refoulement* can be categorised as *jus cogens* if the rule is accepted and recognised by all states as a norm that does not permit any derogation. The *Jus cogens* rule

⁵⁰ Vienna Law of Treaties, Article 53:

'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

can be altered only by a subsequent norm having the same character.⁵¹ Article 53 has plainly designated that clear and strong corroboration is needed to prove that there is a real acceptance and recognition by a large majority of states that the *non-refoulement* principle is indeed a *jus cogens* rule.

As deciphered from the provision, the standard of proof for *jus cogens* can be distinguished from the customary law because it needs states to accept and recognise that a particular international rule should be adhered to without any derogation. The term ‘states as a whole’ could mean all states without exception. The *Oxford English Dictionary* defines the word ‘whole’ as full, complete, as one thing or piece and not separate parts.⁵² Thus, the acceptance and recognition of each and every state counts in the determination of *jus cogens*. As a result, even a single state rejection of the notion could vanquish the *jus cogens* status. Such a strict requisite is understandable, reasonable and coherent, as the *jus cogens* rule will place an unavoidable and continuing obligation on states without the possibility of withdrawal, making reservation or claiming exemption. Nevertheless, putting an overly strict requirement as illustrated above will make Article 53 worthless due to its impossible mission because, under this interpretation, a single state will have a powerful vote that it can use to veto and reject a rule even if it has been accepted by a large majority of states.

⁵¹ Vienna Law of Treaties, Article 53.

⁵² *Oxford Advanced Learners Dictionary* (7th Ed, Oxford University Press, Oxford 2005) 1680

It is generally accepted that ‘states as a whole’ only means a large majority of states or most states. Again, states’ acceptance and recognition needs to be derived from their practice and clear expression of intent to transform a rule into *jus cogens*.⁵³ The real challenge in proving state acceptance and recognition lies in collecting every state’s expression of acceptance and recognition that the rule of *non-refoulement* is indeed a *jus cogens* rule in definite forms. For the expressions of states to be valid and acceptable, they must be unambiguous and unqualified.

Three theories of *jus cogens* have developed, though not completely, from the positivists, the naturalists, and the public order. However, none of them are able to provide answers to two crucial problems: firstly, the normative basis of peremptory norms in international law; and, secondly, the relationship between states’ sovereignty and peremptory norms.⁵⁴ Currently, a new theory of *jus cogens* is developing, which attempts to explain the peremptory status and relationship of state sovereignty.⁵⁵ Proposers of the ‘fiduciary’ theory argue that ‘... *jus cogens* norms are constitutive of a state’s authority to exercise sovereign powers domestically and to claim sovereign status as an international legal actor.’⁵⁶

They further deliberated that:

⁵³ Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 The Yale Journal of Intl Law 331, 336.

⁵⁴ Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 The Yale Journal of Intl Law 331, 346.

⁵⁵ Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 The Yale Journal of Intl Law 331, 347.

⁵⁶ Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 The Yale Journal of Intl Law 331, 347.

‘...the state and its institutions are fiduciaries of the people subject to state power, and therefore a state’s claim to sovereignty, properly understood, relies on its fulfilment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power. One of the requirements of this obligation—perhaps the main requirement—is compliance with jus cogens. Put another way, a fiduciary principle governs the relationship between the state and its people, and this principle requires the state to comply with peremptory norms.’⁵⁷

This theory is arguing that ‘...peremptory norms arise from a state-subject fiduciary relationship rather than from state consent.’⁵⁸ However, the state subject fiduciary relationship is unable to reconcile this presumption of a relationship with the fact that an alien or immigrant is not a subject of the state in which he or she is trying to seek asylum.

Based on the above specification, this study will now examine whether the *jus cogens* status of the *non-refoulement* principle can be firmly established and safely concluded as binding on states with no derogation permitted. In recent years, the non-derogability of the *NR* principle has been asserted by various parties and states on many occasions. Visible support for the *jus cogens* nature of the principle can be found in a number of recent works indicating that the various reasons put forth to defeat the customary status and *jus cogens* nature of the *non-refoulement* principle cannot stand.

⁵⁷ Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 The Yale Journal of Intl Law 331, 347.

⁵⁸ Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 The Yale Journal of Intl Law 331, 347.

Firstly, according to Allain, the principle of *non-refoulement* is a norm that cannot be overridden, and it can be characterised as *jus cogens* because of the numerous Conclusions concerning the non-derogability of the principle made by the UNHCR ExCom and state practice that materialised as a result of the 1984 Cartagena Declaration.⁵⁹ The Conclusions of the ExCom are perceived as states' acceptance because they come from representatives of states who are given the mandate to govern and oversee the UNHCR. The composition of the UNHCR ExCom, which includes representatives of UN member states, is seen as sufficient to satisfy the acceptance and recognition of states as a whole.

However, it should be noted that this view only takes into account the expressions of a small number of states. The current number of ExCom representatives is 79, which is the result of a gradual increase from only 25 members in 1958. There are 191 recognised states in the world including two non-members of the United Nations. This number is nowhere near the requirement set out in Article 53 of the VLT; in fact, it is not even half. Furthermore, it cannot be ascertained whether the state representation of the world's regions is fair. Even if it is considered fair, 79 will not be equal to 'states as a whole'. Since there is no limit on the year when the Conclusions are taken into account, the number of states participating in the making of the Conclusions will be lower because members of the ExCom numbered only 79 in 2010. In the year 2000, there were only 56 members.

⁵⁹ Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of Formalized Regime' (2000) 94 AJIL 284; and Harold Hongju Koh, 'The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council' (1994) 35 Harv. Int'l L. J. 30 had previously noted the *jus cogens* nature of *non-refoulement* based on state practice.

Secondly, it is argued that inconsistent state practice is irrelevant as long as states and international bodies insist on the non-derogable nature of the principle.⁶⁰ This argument is reasonable. Any breach or violation of the *non-refoulement* rule should be treated as a state's failure to respect a rule, not as an objection or rejection of norms. Meanwhile, Bruin and Wouters believe that the war against terrorism should not be accepted as an excuse to undermine the non-derogability of the *non-refoulement* principle.⁶¹

Thirdly, various pieces of case laws have been held to support the non-derogability of the *NR* principle. In *Soering*, the court concluded that Article 3 of the European Convention on Human Rights (ECHR), which prohibits extradition, expulsion and deportation of individuals, permits no exceptions and derogation even where there is a public emergency,⁶² and protection under the principle of *non-refoulement* is considered absolute and unqualified.⁶³ In a situation where an alien can be excluded from the Convention under Article 1F,⁶⁴ he/she is entitled to protection against *refoulement* under Article 3 of CAT⁶⁵ or the customary international law. Nevertheless, it is also important to refer to the ICJ decision in the recent case of *Armed Activities on the Territory of the Congo (Congo v Rwanda)*, which endorsed

⁶⁰ Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 538; 544.

⁶¹ Rene Bruin and Kees Wouters, 'Terrorism and Non-derogability of Non-Refoulement' (2003) 15 IJRL 29

⁶² *Soering v United Kingdom* (1989) 11 EHRR 439, para 79-80, Court Judgement

⁶³ See *Chahal v United Kingdom* (1996) 23 EHRR 413 and *D v United Kingdom* (1997) 24 EHRR 423

⁶⁴ CRSR, Article 1F:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.*

⁶⁵ *Paez v Sweden* (28 Apr 1997) Committee Against Torture, No. 39/ 1996

the existence of the concept of *jus cogens*. However, the judgement does not guide us to the legal status of peremptory norms in international law and the characteristics of peremptory norms, nor how to identify it among other norms.

The fourth argument insists that exceptions to the *non-refoulement* provision, such as those in Article 33 of the Refugee Convention, do not form a basis on which to rule out the non-derogable nature of the principle. It is important that derogation be distinguished from exceptions and limitations under which a rule or norm operates. It is under this notion that an exception in the prohibition of the use of force, as in the Charter of the United Nations, shall not be treated as derogation.⁶⁶ Under similar circumstances, the exceptions provided in the treaty provisions of the *non-refoulement* principle, such as the CRSR, should not be treated as derogation and shall be construed as no more than mere exceptions.

‘Exception’ alone cannot easily defeat *jus cogens*, since there are certain constraints and restrictions imposed on the exceptions. Furthermore, not all instruments provide for exceptions. The OAU Refugee Convention, the ACHR and the Cartagena Declaration do not allow any exceptions to *non-refoulement*. If *refoulement* is justified, states are required to give the person an opportunity to go to another state⁶⁷ that is safe rather than to a state where there is a risk of persecution and torture. The exception does not apply in a situation where the threat constitutes torture, or cruel, inhuman and degrading treatment and punishment. The

⁶⁶ Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford Monographs in International Law, Oxford University Press, UK 2006) 72

⁶⁷ Declaration on Territorial Asylum, Article 3 (3)

interpretation of the exception must be made in a restrictive manner and applied with caution, and with due process of law.⁶⁸ In addition, IHRL does not permit *refoulement* in any circumstances, and this should be used to guide the application of Article 33.⁶⁹

From a different perspective, where mass influx of refugees is involved, it is argued that the non-derogability of the *non-refoulement* is neither sustainable nor practical.⁷⁰ Is it then possible to propose that different rules should apply to mass influx of refugees? The CRSR was introduced in 1951 to deal with the mass influx of refugees in post-World War II Europe; thus, it would not have intended the whole exodus of refugees to be halted or reversed, and the same rule or principle should apply today. Furthermore, the importance of observing the rule of *non-refoulement* at all times is also clearly articulated by the UNHCR ExCom in a number of its Conclusions.⁷¹

⁶⁸ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 52- 53.

⁶⁹ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 48-49. Lauterpacht and Bethlehem restated the content of the *non-refoulement* principle in refugee context in the following terms-

"1. No person seeking asylum may be rejected, returned or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where he or she may face a threat of persecution or to life, physical integrity, or liberty. Save as provided in paragraph 2, this principle allows of no limitation or exception.

2. Overriding reasons of national security or public safety will permit a state to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country." See Ibid. Lauterpacht and Bethlehem, p. 150

⁷⁰ Jean Francois Durieux and Jane McAdam, 'Non-Refoulement Through Time: The Case For a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4.

⁷¹ UNHCR, 'A Thematic Compilation of Executive Committee Conclusions' (UNHCR, 2008) 313-322.

It must also be borne in mind, however, that the CRSR was initially introduced as a temporary tool to manage and solve the problem of mass influxes; therefore, there is a possibility that the suitability of retaining the protection under Article 33 was overlooked when the temporal limit of the CRSR was removed through the 1969 Protocol. Mass influxes of refugees have become more common, the movements of people are caused by different factors than those previously encountered, and the nature of refugee flows has changed. It is therefore justifiable to reconsider the status of the principle of *non-refoulement* in times of very large refugee movements⁷² and the challenges that those influxes could pose to states' security and interests of the nation in general.

5.3.1 Analysis of the Jus Cogens Status of *Non-Refoulement*

Is it then possible to conclude that there is enough evidence to evince that the rule of *NR* has attained the required support to become a *jus cogens* rule? This study inclines to answer in the negative. It is definitely unsafe to conclude from the evidence available that the *non-refoulement* rule is indeed a *jus cogens*. This stance is based on the following grounds:

- a. The question of state sovereignty in relation to *jus cogens* norms is still unresolved despite the attempt by the new fiduciary theory.
- b. There is insufficient evidence to prove that states as a whole have accepted and recognise the status. It is highly doubtful that the rule has garnered enough support from states to become a *jus cogens* norm.

⁷² Jean Francois Durieux and Jane McAdam, 'Non-Refoulement Through Time: The Case For a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4.

However, it is interesting to note that being a peremptory norm only makes a rule non-derogable and completely binding, while the effect of its breach by a state is in fact indistinguishable from the breach of any standard international norm. In *Al-Adsani v United Kingdom*,⁷³ the European Court of Human Rights refused to accept the argument that a state's sovereignty will be deprived as a result of its violation of a *jus cogens* rule. Nevertheless, the sanctions of international law are not the only matter of importance. We understand that the sanctions for the breach are limited but that should not stop us from collecting evidence of state support and real expression of acceptance and recognition of the *non-refoulement* principle as *jus cogens* in the future. It should be emphasised that the impact of being a *jus cogens* rule entails a far-reaching effect in terms of state practice and the implementation of the rule in domestic laws and governance.

5.4 MALAYSIA AS PERSISTENT OBJECTOR

As it has been shown that *non-refoulement* is not a peremptory norm, it is then relevant to discuss Malaysia's status as a persistent objector to the rule. As discussed earlier, objection to and protest against customary international law can be effective if they are made at the formation stage when the rule has not yet been created. A state that dissents from a particular rule must clearly display its disagreement. If the opposite practices are carried out after the formation and for specific reasons, it may not terminate the customary rules because states may take opposite actions that violate the customary rules while still believing that they are bound to abide by the law. The non-compliance is then simply due to economic factors or some other inability.

⁷³ 35763/97, Council of Europe: European Court of Human Rights, 21 Nov 2001, <http://www.refworld.org/docid/3fe6c7b54.html> accessed 14 Oct 2010.

Since the *non-refoulement* principle gives rise to various obligations and has certain implications for states, it is believed that Malaysia could attempt to elude the binding effect of the customary rule by employing the persistent objector rule (POR).⁷⁴ Under the POR principle, a state that does not expressly object to a rule is considered to have acquiesced unless it explicitly raises objections against a particular rule.⁷⁵ This is because the rule works on the basis that no rule of international law can be binding on a state without its consent.⁷⁶ The principle of persistent objector, a typical inclusion in the discussion of the formation of customary international law, permits a state to opt out of new rules of international law. However, in practice, the International Court of Justice (ICJ) is extremely reluctant to accept a state's objection; and states in general do not acknowledge or recognise other states'

⁷⁴ For detailed discussion and analysis of the rule, see Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 Mich. J. Int'l L. 115; Holning Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 Chi. J. Int'l L. 495; Jonathan I. Charney, 'Universal International Law' (1993) 87 Am. J. Int'l L. 52; Jonathan I. Charney, 'International Agreements and the Development of Customary International Law' (1986) 61 Wash. L. Rev. 971; David A. Colson, 'How Persistent Must The Persistent Objector be?' (1986) 61 Was. L. Rev. 957; Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 British Yearbook of International Law, 1; Ted L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 Harv. Int'l. L. J. 457; and Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 Am. J. Int'l L. 443.

⁷⁵ Jonathan I. Charney 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 1, 2.

⁷⁶ The majority of international law writers supported the rule but their assertions were not sufficiently corroborated by state practice and judicial decision. Diverse acceptance of the rule is centrally linked to the argument that the rule was not confirmed by state practice. For example Gennady M. Danilenko, 'The Theory in International Customary Law' (1988) 31 Germany Yearbook of International Law 9, 41-43. Also see Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law'; Ted L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985); Peter Malanczuk, *Akehurst's Modern Introduction to International Law*; and Brownlie, I., *Principles of Public International Law*. In Jonathan I. Charney, 'Universal International Law' (1993) 87 Am. J. Int'l L. 52, it was argued that states should never be allowed to dissent or be exempted from a universal rule if such exemption will allow 'riders' and lead to grave consequences such as the exemption in environmental law which controls dangerous emissions into the atmosphere and thus has a long-term direct effect on humankind due to its grave consequences for the ozone layer.

objections.⁷⁷ Although this is not straightforward, by proving that it has indeed persistently objected to the customary status of the principle of *non-refoulement* during its emergence and subsequently after it became customary, Malaysia may be able to discharge itself from the rule.⁷⁸ The principle of *non-refoulement*, as discussed earlier, has received majority support from states, and therefore a state that wants to object ‘...needs to be especially vigilant in protecting its legal position’.⁷⁹ In assessing Malaysia’s objection to the customary status of the principle of *NR*, two elements must be satisfied: first, the objection must have been made persistently over time, before and after the rule’s emergence; and, secondly, the objection must be made known to other states.⁸⁰ The ICJ’s refusal to accept objections in a number of cases has prompted Stein to claim that it is easier to find cases where states have claimed the ‘persistent objector rule’ but failed than to find the real application of the rule by the courts.⁸¹ The following discussion examines Malaysia’s physical actions and statements/ verbal actions to assess whether or not they are in support of the principle of *NR*.

⁷⁷ Stein, ‘The Approach of the Different Drummer’ Stein asserts that the principle of persistent objector has been claimed in many cases; however, such claims were unsuccessful owing to a lack of state practice to support the objection.

⁷⁸ See David A. Colson, ‘How Persistent Must the Persistent Objector Be?’ (1986) 61 *Was. L. Rev.* 957, 965. In discussing how persistently objections should be made, Colson groups legal principles into four categories;

‘(1) principles promoted as being universally applicable and which are indeed supported by the majority of states, (2) principles promoted as being universally applicable but where it is less clear that they enjoy the support of majority of states, (3) principles having application in strictly bilateral settings, and (4) new assertions in international law that depart from customary norms and which affect the rights of the international community as a whole’

⁷⁹ David A. Colson, ‘How Persistent Must the Persistent Objector Be?’ (1986) 61 *Was. L. Rev.* 957, 967.

⁸⁰ David A. Colson, ‘How Persistent Must the Persistent Objector Be?’ (1986) 61 *Was. L. Rev.* 957, 965.

⁸¹ Stein, ‘The Approach of the Different Drummer’, 457, 459. 460. Stein also criticises the parties in the *Fisheries* case who, despite acknowledging and concurring on the existence of the principle and claiming to have made such objection, failed to provide any instances of practice of the principle.

5.4.1 Arrangement with UNHCR Regarding the Indochinese Refugees

Some of the early suggestions that the rule had become customary international law emerged in the late 1980s, a period Malaysia when was struggling to cope with the mass influx of Indochinese refugees, and the assertion has been consistently maintained to this day.⁸² From the beginning of 1975, when Vietnamese refugees first set foot on Malaysian shores, until the 1980s, Malaysia's response was a mixture of compliance and *non-refoulement*, including the other contradictory practices such as those regarding stowaways and redirections.⁸³

During this period, Malaysia never claimed that it had no responsibility for refugees. What it did claim was that the country was unable to accept the burden of hosting a mass influx of refugees due to security reasons and shortage of resources.⁸⁴ It did not reject any obligation to

⁸² There are, however, some suggestions that the principle may not be applicable in situations of mass influx, but this has been countered by the fact that the CRSR was adopted in response to the massive exodus of refugees after the World War II and therefore it should continue to protect refugees who are displaced in a big group today and in the future. Furthermore, the ground of expulsion in the CRSR does not include mass influx situation. Elihu Lauterpacht, and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 114- 119. It is also argued that the principles of the CRSR remains as the framework of protection. UNROL, 'Protection Of Refugees In Mass Influx Situations: Overall Protection Framework ' (United Nation Rule of Law, 2001) EC/GC/01/4, para 17-18.

<<http://www.unrol.org/files/Protection%20of%20Refugees%20in%20Mass%20Influx%20Situations%20Overall%20Protection%20Framework.pdf>. Accessed 15 March 2012. The UNHCR ExCom Conclusion No 22 (XXII) 1981 stated that mass influx situations must be dealt with full adherence to the *non-refoulement* principle..

⁸³ The boats were towed offshore and forced to leave or given extra supplies and the refugees being asked to continue their journey to other countries. See, generally, Arthur C. Helton, 'The Malaysian Policy to Redirect Vietnamese Boat People: Non-Refoulement as a Human Rights Remedy (1992) 24 N.Y.U. J. Int'l L. & Pol. 1203; Fauziah Ismail, 'United Nations: Urgent Action Needed to Protect Refugees', Bus. Times (Malaysia), Nov 8, 1993, at 1; Kamatchy Sappani, 'Asian News; Malaysia Admits Towing Out Boat People' Japan Economic Newswire, July 17, 1989 at 2; Dorall RF, 'Muslim Refugees in Southeast Asia, the Malaysian Response' (1988) Asian Migrant 1 (3): 88- 93 , Muntarbhorn, V., *The Status Of Refugees In Asia* (Clarendon Press, London 1992) p. 113- 120 and Sothi Rachagan, 'Refugees and Illegal Immigrants: The Malaysian Experience with the Filipino and Vietnamese Refugees' in Rogge J R (ed) *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) p. 257.

⁸⁴ See discussion in Chapter 4.

refugees. In its response to the UN Secretary General's telegram regarding the rejection of the boat people, the then Prime Minister, while asserting Malaysia's status as a sovereign state, made no attempt to deny Malaysia's obligation to accept refugees and repeatedly maintained that the country had insufficient resources to absorb the burden.⁸⁵ The Prime Minister demanded that Western states do more to resolve the conflict on Malaysian territory. In short, the Prime Minister is emphasising on the urgent need for burden sharing and international solidarity because Malaysia is enduring an enormous challenge inside out.

Malaysia's response to the Vietnamese refugees was more widely published and documented compared to its reaction to the Filipino refugees and the Cambodians, who were granted temporary refuge. From 1983, refugees from Burma (currently Myanmar) and Indonesia were continuously arriving in Malaysia seeking protection. Malaysia's positive practice or actions in support of the *non-refoulement* principle included, but were not limited to, the admission of refugees, providing temporary refuge and maintaining refugee camps, permitting refugees to settle permanently in the country, and providing specific sites for the accommodation of Filipino refugees

5.4.2 The AALCO Membership

Malaysia has been a member of AALCO since 1970, which adopted the Bangkok Principles on Status and Treatment of Refugees in 2001. Although this is only soft law, it is still a recognition that states have a duty to protect refugees against forced return. Malaysia's

⁸⁵ Cross-refer to Chapter 4.

participation in the conference to prepare the Bangkok Principles and its adoption is a positive conduct that cannot be inferred as objection.

5.4.3 Malaysia's Report on its Observation of Customary International Law Relating to Refugee Children.

In the first report to the Committee on the rights of the Child, the Malaysian authority made the following comment in response to its practice relating to Article 22⁸⁶ of the UNCRC:

*“Although the Government of Malaysia has not ratified the Refugee Convention, the Government has always observed the customary international laws in this area. Persons entering Malaysia claiming to be refugees have always been given assistance on humanitarian grounds.”*⁸⁷

Note that the Malaysian authority maintained that the country has always rendered assistance to refugees on humanitarian ground.⁸⁸ This statement lend support to Malaysia's sense of legal obligation under the principle of *non-refoulement* by allowing refugee to remain in the country or not returning them to their countries of origin.

⁸⁶ 1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

⁸⁷ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Initial Report of States Parties Due in 1997, Malaysia*, 22 Dec 2006, CRC/C/MYS/1, available at: <http://www.refworld.org/docid/4631bb9d4.html> [accessed 4 Jan 2009] para 324.

⁸⁸ Also see Amarjit Kaur, 'Refugees and Refugee Policy in Malaysia' (2007) UNEAC Asia Papers (Special Issue Refugees and Refugee Policies in the Asia Pacific Region) 77, 88. <<http://www.une.edu.au/asiacentre/PDF/No18.pdf>> accessed 16 Aug 2009.

As the report was commissioned by the Ministry responsible for the welfare of children in general, it is possible to conclude that the authorities do realise their responsibility under the CIL and have thus acted in full awareness of the principle. Malaysia's positive acts towards refugee children as well as adult refugees in general can be construed as an implied acknowledgement of its duty under the customary rule of *non refoulement*. Malaysia's consistent practice in allowing refugee to stay in the country temporarily since the Indochinese exodus until today manifested the sense of legal obligation not to return..

In the Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the UNHCR office stated that in its observation of non-contracting state practice in relation to NR principle, there are overwhelming indications from states of their acceptance of the binding nature of the principle. Moreover, states do have explanation and justification for any inconsistent conduct but not rejection of the rule.⁸⁹ This explains Malaysia's position in the treatment of refugee children as reported to the CRC.

5.3.4 Analysis of Malaysia's Position as Persistent Objector.

Malaysia's actions that could be counted as objections to the rule of *non-refoulement* can take a variety of forms and may include actual practice, diplomatic correspondence and diplomatic statements by state officials.⁹⁰ However, as Stein and Colson⁹¹ show in their analysis, it is impossible to gather all evidence of state objections because there may be too many or they

⁸⁹ Para 15. <http://www.refworld.org/pdfid/45f17a1a4.pdf>. Accessed 5 Feb 2013.

⁹⁰ David A. Colson, 'How Persistent Must the Persistent Objector Be?' (1986) 61 Was. L. Rev. 957, 961-965.

⁹¹ David A. Colson, 'How Persistent Must the Persistent Objector Be?' (1986) 61 Was. L. Rev. 957, 957.

may be beyond reach, such as communications between states, which may be confidential. In any event, the fact that a state recorded more acts or objections than another state may be insufficient to establish a legal relationship between the rule and the objections.⁹²

A study of the literature reveals that, during the mass influx of Indochinese refugees, Malaysia not only made a commitment to admit the boat people and give them temporary shelter but also cooperated with the UNHCR and other NGOs.⁹³ Unfortunately, on numerous occasions it fell short of keeping its promise, justifying this by referring to limited resources, conflicting national interest and national security. However, despite the occurrence of *refoulement* throughout the period, there is no evidence to show that Malaysia has ever objected to the principle or denied the responsibility to protect against forced return, even though Malaysia remains adamant in maintaining that it is not a party to the 1951 Convention and, thus, has no obligation under it.⁹⁴

It also asserted that the policy of allowing refugees to remain in the country is merely a humanitarian gesture but again this is not objection but a mere acknowledgement of responsibilities. In recent years, the government has continued to contend that Malaysia has no intention of ratifying the 1951 Convention, while remaining silent on its obligation under

⁹² In the case of the delimitation of the Marine Boundary in the Gulf Maine Area (Canada v US), 1984 I.C.J. 246 the court was presented with a lengthy list of action by both parties.

⁹³ See Yen Tran, 'The Closing Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Law'; A.C. Helton,, 'Refugee determination under the Comprehensive Plan of Action: Overview and Assessment' (1993) International Journal of Refugee Law, 544-558; A.C. Helton, '*The Comprehensive Plan Of Action For Indo-Chinese Refugees: An Experiment In Refugee Protection And Control*' (1990) 8 New York Law School Journal of Human Rights, 111- 148.

⁹⁴ Malaysia admitted that it towed the boat people out of Malaysian waters but claimed that this was at the request of the boat people themselves; it makes no objection to its responsibility. See Kamatchy Sappani, 'Malaysia Admits Towing Out Boat People', Asian News: July 17, 1989 at 2. The boat people were also pushed away because they were believed to be economic migrants, not refugees. See n.a. 'Malaysia to Close', Asian News: Aug 17, 1991.

the *non-refoulement* principle. Furthermore, Malaysia has never been treated as an exception by other states,⁹⁵ and Malaysia's violations of the principle have been widely criticised.⁹⁶ In light of the available evidence, it is safe to conclude that Malaysia's claim as a persistent objector cannot be accepted and cannot prevail as on no occasion can an objection be found to the binding nature of the principle on Malaysia.

In short, the customary status of the principle of *non-refoulement* has earned widespread support from scholars, and evidence of Malaysia's persistent objection to the principle of *non-refoulement* is insufficient for it to be exempted from the operation of the rule. Thus, the principle of *non-refoulement* binds Malaysia under customary international law and Malaysia is under the obligation not to return refugees, asylum-seekers or any person to a frontier or territory where there is a risk of persecution, torture, cruel, inhuman and degrading treatment or punishment, or risk to that person's life and liberty.

5.5 MALAYSIA'S OBLIGATION ARISING OUT OF THE CUSTOMARY RULE OF NR.

As discussed earlier in Chapter 2 and the earlier section of this chapter, the principle of *NR* is found not only in the CRSR⁹⁷ but also CAT,⁹⁸ ICCPR,⁹⁹ ECHR,¹⁰⁰ OAU Refugee

⁹⁵ The Soviet Union failed in its objection against diplomatic immunity as there was no evidence that other states had ever treated Soviet diplomats differently from others. See Joni S. Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of An Enigma' (1991) 25 Geo. Wash. J. Int'l. L. & Econ. 71, 76.

⁹⁶ By UNHCR, ExCom, USCRI and other states. See, for instance, Arthur C. Helton, 'The Malaysian Policy to Redirect Vietnamese Boat People: Non-Refoulement as a Human Rights Remedy' (1992) 24 N.Y.U. J. Int'l. L. & Pol. 1203.

⁹⁷ Article 33:

Convention,¹⁰¹ ACHR¹⁰² and the Bangkok Principles of the AALCO¹⁰³ and these provisions share some similar attributes; protection against return/ rejection/ expulsion to any territory that could result in risk of torture, threats to life, human rights violation, or violation to

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

98 Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

99 Article 13:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

100 Article 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Even though the Article did not mention prohibition of return, this Article has been used by the European Court of Human Rights to provide protection against refoulement. David Weissbrodt and Isabel Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non Refoulement provisions of other international human rights treaties' (1999) 5 Buff.Hum. Rts.L.Rev.1, 28. See the application of Article 3 in *Soering v United Kingdom* (1989) 11 EHRR 439 and *Yefimova v Russia* (App. No. 39786/09) [2013] ECHR 39786/09.

101 Article 2:

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

102 Article 22(8):

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

103 Article III

1. No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.

The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person's presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

2. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

personal freedom. *NR* is the most basic protection for refugee¹⁰⁴ and derogation to the protection is only allowed when a person's presence poses danger to national security and public order which must be declared by the court. The content of the *NR* principle involves three important components encompassing what constitute return; who is entitled to the protection; and what states need to do in order to realise the protection duty.

The compliance to the principle requires states to resist from committing any form of return or *refoule* both in its own territory and when it exercises its jurisdiction outside the territory.¹⁰⁵ The term *refoule* constitutes wider connotation than just return, rejection and expulsion. Measures taken by states such as “... *electrified fences to prevent entry, non-admission of stowaway asylum-seekers and push-offs of boat arrivals or interdictions on the high seas...*”¹⁰⁶ also amounts to *refoule*. States must ensure that interception measures at sea

¹⁰⁴ UNHCR, *General Conclusion on International Protection*, 11 Oct 1991, No. 65 (XLII) - 1991, available at: <http://www.refworld.org/docid/3ae68c404.html> [accessed 9 June 2014]; and UNHCR, *General Conclusion on International Protection*, 9 Oct 1992, No. 68 (XLIII) - 1992, available at: <http://www.refworld.org/docid/3ae68c6e1c.html> [accessed 9 Jun 2014] The UNHCR make similar call to states in the General Conclusion almost every year. See UNHCR, *A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011*, June 2011, available at: <http://www.refworld.org/docid/4f50cfbb2.html> [accessed 9 Jun 2014].

¹⁰⁵ *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, 23 Feb 2012, available at: <http://www.echr.coe.int>; UNHCR, *UNHCR Public Statement in Relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees pending before the Court of Justice of the European Union*, Aug 2012, C-528/11, available at: <http://www.refworld.org/docid/5017fc202.html> [accessed 9 Jun 2014]; and UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, at paras. 4.1.1-4.2.3, available at: <http://www.unhcr.org/refworld/docid/4b97778d2.html>.

¹⁰⁶ United Nations High Commissioner for Refugees, UNHCR Note on principle of Non- Refoulement, Nov 1997) <http://www.refworld.org/docid/438c6d972.html> accessed 20 Apr 2013.

must be conducted in a way that will not deny asylum seekers and refugees from accessing international protection or caused them to be returned.¹⁰⁷

The prohibition also applies to the state in which a person is to be removed from and any other state to which the person will be removed to.¹⁰⁸ In *Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32*, the High Court declares that the arrangement to transfer the plaintiff from Christmas Island to Malaysia for the purpose of refugee determination status by the UNHCR office in Kuala Lumpur without any prior assessment by the Australian authority as invalid since Malaysia does not offer adequate legal protection for refugees.

The prohibition against return applies to individual as well as for groups. In large scale influx they must at least be admitted on temporary basis.¹⁰⁹ Protection under the *NR* principle covers all persons who are within a State's territory or subject to its jurisdiction including asylum seekers and refugees¹¹⁰ Discrimination as to race, religion, political opinion, nationality, country of origin and physical incapacity must be avoided.¹¹¹ The rule applies to

¹⁰⁷ UN High Commissioner for Refugees (UNHCR), *Conclusion on Protection Safeguards in Interception Measures*, 10 Oct 2003, No. 97 (LIV) - 2003, available at: <<http://www.refworld.org/docid/3f93b2894.html>> [accessed 8 June 2013]

¹⁰⁸ Human Rights Committee, General Comment No 31 on the Nature of General Legal Obligations on State Parties to the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 Apr 2004) para 12.

¹⁰⁹ UN High Commissioner for Refugees (UNHCR), *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 21 Oct 1981, No. 22 (XXXII) - 1981, available at: <http://www.refworld.org/docid/3ae68c6e10.html> [accessed 9 June 2014]

¹¹⁰ Human Rights Committee, General Comment No 31 on the Nature of General Legal Obligations on State Parties to the Covenant (U.N. Doc. CCPR/C/21/Rev.1/Add.13, 21 Apr 2004) para 12.

¹¹¹ UNHCR, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 21 Oct 1981, No. 22 (XXXII) - 1981, available at: <http://www.refworld.org/docid/3ae68c6e10.html> [accessed 9 June 2014]

persons who would “.... *face real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment...and persons who may face a threat of persecution or to life, physical integrity or liberty*”.¹¹² Only threat to state security and public order can justify derogation from the rule subject to stringent conformity to legal process¹¹³ including when dealing with extradition of refugee.¹¹⁴ In *Németh v. Canada (Justice)*,¹¹⁵ the Supreme Court is of the view that the Minister has failed to base his decision on the serious crime exception before agreeing to an extradition request.

5.5.1 Identification of Refugees by the Authority

Central to the realisation of protection under the rule of *non-refoulement* is the determination of refugee and persons of concern. The protection described above can only be granted if the person who should benefit from it can be identified by the states.. Hence, it follows naturally that the duties and obligation of states found in the description of the content above shall include the duty to identify ‘persons’ entitled to the protection, which shall involve a specific procedure of screening aliens claiming protection as asylum-seekers. The obligation under the principle of *non-refoulement* requires states to determine that a person is in fact a refugee or someone who cannot be returned, thus enabling him/her to claim protection under the

¹¹² Lauterpacht, E., and Bethlehem, D., ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 87.

¹¹³ Lauterpacht, E., and Bethlehem, D., ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 87.

¹¹⁴ UNHCR, *Problems of Extradition Affecting Refugees*, 16 Oct 1980, No. 17 (XXXI) - 1980, available at: <http://www.refworld.org/docid/3ae68c4423.html> [accessed 9 Jun 2014].

¹¹⁵ (2010) SCC 56. The appellant is a recognized refugee in Canada together with his family. After years of being a permanent resident in Canada, an international warrant was issued by his country of origin, Hungary, which then requested his extradition. The appellant is wanted for a charge of fraud but the value of the alleged offence cannot be confirmed and thus the punishment too. Since the Minister has not considered whether the offence is a serious offence, he has failed to consider if the applicant is excluded from the protection of *non-refoulement* principle.

principle. The authority must be satisfied that no asylum seekers were returned when it decides to reject aliens at the border or intercept a vessel and redirect it. The identification should be carried out by a body/agency that has the duty and capacity to do so and to deal with related matters arising out of the identification. The agency should have a function similar to refugee status determination (RSD), as practised by contracting states to the CRSR.

Providing a fair and effective procedure is also part of the duty under the *non-refoulement* principle. The requirement is stated in several General Conclusions including No. 81,¹¹⁶ No. 85,¹¹⁷ No. 93,¹¹⁸ and No. 99.¹¹⁹ In *Hirsi Jamaa and others v Italy*¹²⁰ the court explains that a fair and effective refugee status determination and assessment procedure is part of the *NR* obligation. The European Court of Human Rights in deciding the case of *Al-Tayyar*

¹¹⁶ UNHCR, *General Conclusion on International Protection*, 17 Oct 1997, No. 81 (XLVIII) - 1997, para (h) available at: <http://www.refworld.org/docid/3ae68c690.html> [accessed 9 Jun 2014]:

“*Reaffirms* Conclusion No. 80 (XLVIII), and notes that a comprehensive approach to refugee protection comprises, *inter alia*, respect for all human rights; the principle of *non-refoulement*; access, consistent with the 1951 Convention and the 1967 Protocol, of all asylum-seekers to fair and effective procedures for determining status and protection needs; no rejection at frontiers without the application of these procedures; asylum; the provision of any necessary material assistance; and the identification of durable solutions which recognize human dignity and worth;”

¹¹⁷ UNHCR, *General Conclusion on International Protection*, 1998, No. 85 (XLVIII) – 1998. Para (q): “*Strongly deplores* the continuing incidence and often tragic humanitarian consequences of *refoulement* in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs;”

¹¹⁸ UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 Oct 2002, No. 93 (LIII) - 2002, para (a) available at: <http://www.refworld.org/docid/3dafdd344.html> [accessed 9 Jun 2014]:

“(a) *Recognizes* the need to establish and apply fair and expeditious asylum procedures, so as to identify promptly those in need of international protection and those who are not, which will avoid protracted periods of uncertainty for the asylum-seeker, discourage misuse of the asylum system and decrease the overall demands on the reception system;”

¹¹⁹ UNHCR, *General Conclusion on International Protection*, 8 Oct 2004, No. 99 (LV) - 2004, para 1, available at: <http://www.refworld.org/docid/41750ef74.html> [accessed 9 Jun 2014]:

“*Expresses concern* at the persecution, generalized violence and violations of human rights which continue to cause and perpetuate displacement within and beyond national borders and which increase the challenges faced by States in effecting durable solutions; and *calls* on States to address these challenges while ensuring full respect for the fundamental principle of *non-refoulement*, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs;”

¹²⁰ (2012) 33 BHRC 244

*Abdelhakim v. Hungary*¹²¹ accepted the applicant's complaint that he had been denied an effective judicial review following his prolonged detention by the authority of Hungary. A fair and effective procedure also signifies that a person's application must be considered individually.¹²²

To illuminate the requirement for a mechanism to determine a person's status, it is useful to look at the operation of the CRSR, which does not specify any form of refugee determination status. However, in order to accord protection to the right person or refugee, states commonly set up a body/agency for that purpose. In the United Kingdom, for example, application for refugee status shall be made using a specified form to the UK Border Agency (UKBA), who will decide on the application.¹²³ The decision of the UKBA can be appealed to the Immigration Tribunal.¹²⁴

This study argues that the duty of states to identify a refugee through a fair and effective procedure can only be fulfilled if a mechanism is set up for that purpose without which, the practice of the authority can become inconsistent and cause injustice to the applicants.

¹²¹ Application No. 13058/11, Council of Europe: European Court of Human Rights, 23 Oct 2012, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113936>

¹²² *Hirsi Jamaa and others v Italy (2012) 33 BHRC 244, 309.*

UNHCR, *Case of Pacheco Tineo Family v. Bolivia (Summary of the Judgment)*, 25 Nov 2013, para. 153, available at: <http://www.refworld.org/docid/53ce2cee4.html> [accessed 10 Jun 2014]

¹²³ UKBA, 'Asylum' (UK Border Agency) available at <http://www.ukba.homeoffice.gov.uk/asylum/> accessed 20 Sept 2013.

¹²⁴ UKBA, 'Appeal' (UK Border Agency) available at <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/appeals/> accessed 20 Sept 2013

Furthermore, a special mechanism under the auspices of a specific agency can avoid arbitrariness as compared to case by case approach.¹²⁵ A judicial decision in Hong Kong can be used to support this claim. In contrast to Malaysia, which has never been forced to respond to refugees' claims in court, the case provides an important comparison and guidance for the application of *non-refoulement* in Malaysian territory. The cases under study were considered together at the High Court of the Hong Kong Special Administrative Region,¹²⁶ in which the applicants of all the cases sought judicial review against the decision of the UNHCR not to recognise them as refugees and then the refusal upon appeal. They also sought a number of declaratory reliefs. This is the only case so far, that deals with the status of NR as an international custom and its applicability in Hong Kong a non-contracting state.

In *C v Director of Immigration*, the court needed to determine, first, whether the principle of *non-refoulement* is a customary international law and, second, whether the rule applies in Hong Kong and thus requires the authority to administer a refugee determination mechanism. Three issues considered in the case of *C* are useful for an understanding of the application of customary international law in Malaysia and the duties of the state arising out of the obligation. As Hong Kong is not a party to the CRSR,¹²⁷ its refugee applications are being

¹²⁵ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : Singapore*, 4 May 2011, CRC/C/SGP/CO/2-3, available at: <http://www.refworld.org/docid/4dcb89f92.html> [accessed 11 Feb 2013]

¹²⁶ *C v Director Of Immigration* (Constitutional And Administrative Law List No. 132 Of 2006); *AK v Director Of Immigration* (Constitutional And Administrative Law List No. 1 Of 2007); *KMF v Director Of Immigration And Secretary For Security* (Constitutional And Administrative Law List No. 43 Of 2007); *VK v Director Of Immigration* (Constitutional And Administrative Law List No. 44 Of 2007); *BF v Director Of Immigration And Secretary For Security* (Constitutional And Administrative Law List No. 48 Of 2007); and *YAM v Director Of Immigration* (Constitutional And Administrative Law List No. 82 Of 2007).

¹²⁷ China is a party to the CRSR but Hong Kong resisted the application of the Convention in its territory.

processed independently by the UNHCR office. It was decided by the court that the principle of *non-refoulement* does exist in customary international law; however, the rule was found to be contradictory to Hong Kong law and has been repudiated by the Hong Kong authority, thus rendering the rule inapplicable in Hong Kong. As the result, there is no requirement for Hong Kong to establish a refugee screening mechanism as claimed. At the same time, the court failed to decide Hong Kong's *non-refoulement* obligation under CAT.

This case is very relevant to the discussion of Malaysia's obligation under the principle of *non-refoulement* as Hong Kong shares some common characteristics with Malaysia. Both jurisdictions are non-parties to the CRSR, and both persistently adhere to the policy of not granting refugee status, having no provisions for refugee protection and handling. Refugee registration and determination of application for refugee status are handled by the UNHCR in the respective territories exclusively, with no involvement of the government. It must be pointed out that, apart from the UNHCR'S screening mechanism, Hong Kong has another parallel mechanism established by the authority to decide on applications for protection against torture claims under CAT. Malaysia, however, has no screening mechanism that is under the purview of the authority.

The court in C claimed that, even though Hong Kong is bound by the principle of *NR*, the obligation was repudiated by the authority. However, it offered no reasoning to support this decision, and the doctrine of incorporation does not apply in Hong Kong mainly due to the inconsistency of the principle with the domestic law of Hong Kong. This inconsistency,

according to Hartmann J., was construed from the lack of domestic legislation providing protection for refugees; therefore, the customary rule of *NR* is not deemed part of Hong Kong law.

On appeal, the Court of Final Appeal, *C v. Director of Immigration* [2013] 4 HKC 563, decided that refugee screening is a duty of state even though UNHCR is already in the territory to conduct refugee status determination. The Court of Final Appeal also acknowledged that *NR* is a customary international law as was decided in the Appeal Court earlier.

According to the European Court of Human Rights in *Hirsi*, the absence of an individual, fair and effective procedure for the purpose of screening asylum seekers amounts to serious breach of the *NR* rule. The decision in *C* and *Hirsi* have lent some answer to the following question: If the UNHCR is allowed to process the application or the screening without any control, participation or involvement of the state's government/ authority throughout the process, will this amount to the positive discharge of the duty of state to determine who is entitled to protection? The answer to this question is negative; as explained above. It is insufficient to shift the burden solely to UNHCR because its power and capability in the country is very limited and it has no power to execute its findings as it lacks the administrative and prerogative powers possessed by the executive. UNHCR will never be able to replace a government's own agency that could be armed with various powers and legislations that can be easily implemented by the executive and then judicially applied. Together with the duty to identify refugees or persons entitle to *NR* comes the duty to provide the proper avenue to deal with the exception in the application of the protection, which must

consist of a due process of law such as the court. The avenue should be independent from the body set out for the purpose of identification or screening as explained above.

5.6 CONCLUSION

The discussion in this Chapter has shown that the position of the *NR* principle as a customary law is apparent and that evidence to cast out its status is not sufficiently convincing. It has also been clearly shown that Malaysia's actions or responses to refugees, especially refugee children, which conform to international standards, are not merely humanitarian gestures but have been projected out of its sense of obligation to international norms. The defence of the persistent objector's rule cannot be substantiated due to a lack of clear and consistent protestation. There have, in fact, been actions that further supported Malaysia's sense of legal obligation in connection with the principle of *NR*.

As regards to its duty under the customary rule of *NR*, Malaysia has not fully discharge its duty and obligation by not providing a screening mechanism for asylum seekers/ refugees in its territory. Malaysia's absolute and full dependence on UNHCR in processing refugee claims is an insufficient discharge of its duty under the rule and this violates its customary international law obligations. There is a lack of transparency and review/appeal avenues available to applicants.¹²⁸ Furthermore, even though a special court has been set up to

¹²⁸ This problem is not exclusive to Malaysia. The Hong Kong cases as discussed above also commented on the lack of transparency of the UNHCR's determination process. In Michael Kagan's work, "The Beleaguered Gatekeeper: Protection Challenges Posed By UNHCR Refugee Status Determination' (2006) 18 IJRL. 1- 43, the writer asserted that UNHCR's work in determining refugee claims was affected by inadequate procedural safeguards; primacy of government policy; and the missing link and connection between UNHCR determination and government conduct and domestic law. The writer believes that similar conditions are present in Malaysia.

expedite the trials of immigration detainees, the purpose is not to determine whether the detainee is in fact a refugee but rather to decide whether the person has violated the provisions of the Immigration Act 1959/63 on illegal entry and stay. The trial, as explained earlier in Chapter 3, is full of threats and is not a fair trial. It is high time for Malaysia to ensure that its administrative, legislative and judicial branches strive to satisfy the duties encompassed by the principle of *NR*. The next agenda of this thesis is to investigate the customary status of the principle of the best interests of the child in Chapter 6.

CHAPTER 6

CUSTOMARY STATUS OF THE PRINCIPLE OF THE BEST INTERESTS

OF THE CHILD

6.1 INTRODUCTION

This chapter examines the principle of the best interest of the child, another useful rule that can be used as an argument to enhance the protection of refugee children. While the *non-refoulement* principle applies to all refugees or people in refugee-like situations in general including children, the application of the principle of the best interests of the child (BIC) is specific to children in any circumstances, anytime, anywhere, as long as they involve the elements of actions and decisions impacting on children. As discussed earlier in 2.3.2, the application of the rule in refugee situation can benefit children and enhance the enjoyment of their rights. The focus of this chapter is to establish that the principle of the BIC is a realistic option with which to analyse the protection of refugee children in states that have not ratified the CRSR by holding that non-contracting states are bound to protect refugee children and asylum-seekers under the principle of the best interests of the child, which has become a customary rule.

For this purpose, this chapter begins with a discussion on the reason why the BIC principle is being seen as an appropriate framework to confer better protection on refugee children, and the application of the principle in refugee situations. Next, it analyses legal obstacles

impeding the adoption of the UNCRC in some states, which has resulted in the proposal to apply the principle of the BIC in its capacity as universal norms. Hence, the discussion moves on to an analysis of whether the rule of the BIC has satisfied all the requirements for it to be regarded as an international custom. Finally, the chapter discusses the content of the principle and the duties of states to refugee children under the principle. If these two interrogations can be completed in the positive, then it will be possible to compel states to abide by the customary rule.

6.2 CUSTOMARY STATUS OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

It is true that the UNCRC has provided comprehensive protection for children, including refugee children, and it has been ratified by all countries except for the USA and Somalia. In reality, however, the domestic force of the UNCRC is affected by the reservations made by states, and by the incorporation and transformation of the UNCRC as part of national laws or, in other words, its status as a source of law in domestic courts. Even though states have voluntarily consented to be bound by the UNCRC through accession and ratification, in practice these consents may be deemed worthless when, at the same time, states also take measures that created various obstacles to the effective implementation of the UNCRC or have failed to remove legal obstacles to allow such implementation.

As with other international treaties, state legislative practices have a visible bearing on the implementation and applicability of the UNCRC provisions. Monist states such as Germany and Holland require no specific or special legislation to adopt the UNCRC, and the

Convention will take effect in those states as if it were state legislation. In contrast, for dualist states such as Malaysia and the United Kingdom the UNCRC can only become a municipal law after an enabling statute is enacted declaring the adoption of the UNCRC as national law or in the form of a constitutional declaration made under a clause of the constitution.

In dualist states, the legal force of the UNCRC can be defeated simply by not taking any legislative action to that effect. This has made it essential to find a way of making states responsible for children through other avenues. To do this, it is crucial to identify any principle and rule in the UNCRC that is globally recognised as an entrenched norm practised by and within the international community and that may overrule the need for consent and transformation of international law into municipal law; it would thus be binding on all states and activate the protection for refugee children regardless of its transformation into or incorporation as domestic law. This study believes that customary international law is a functional instrument for improving the condition of refugee children in states that are neither party to the CRSR nor have made the UNCRC the national law.

6.3 THE PROOF OF CUSTOM.

There are two ways of establishing customary international law in this regard: either by showing that the UNCRC itself has evolved into customary international law and that all of its contents and provisions are therefore binding on all states; or by showing that any of the provisions of the UNCRC, such as the principle of the best interests, has crystallised into customary rules. The fact that the UNCRC has received a broad consensus from states has inspired a belief among observers that the Convention is indeed a customary international

law.¹ As early as 1993, there were suggestions that the UNCRC would attain its customary status based on the number of ratifications.² Support for the customary status was also asserted by the former Chairperson of the Committee on the Rights of the Child, who viewed the global recognition and ratification of the UNCRC as the basis of the formation.³

Even though this study takes the view that proving both beliefs will have substantial benefits for refugee children in general, it also believes that proving the latter is more feasible than demonstrating the former and it intends to show that only the principle of the BIC is now a rule of customary international law. By proving that the principle of the BIC has attained customary status, this study hopes to convince states of their obligation under the rule. Additionally, it could fill the rights gap that might arise under the *non-refoulement* principle if it were to stand alone.

When both rules are applied simultaneously, refugee children are able to enjoy meaningful protection: not merely the right to remain in a safe host country but also the basic rights that will enable them to develop and reach their potential because states are acting in parallel with their best interests. To show that the principle of the BIC is now a customary international law, this study demonstrates that Article 3 of the UNCRC has satisfied the three conditions: i)

¹ See Connie de la Vega, 'The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?' (1994) 11 Harvard. Blackletter J. 37, 45-46.

² Gary B. Melton, 'Children, Families, and the Courts in the Twenty-First Century' (1993) 66 S. CAL. L. REV. 1993, 2039-40.

³ Jaap Doek at the General Discussion: Working Group 1 on the 'child's right to be heard in judicial and administrative proceedings on 15 Sept 2006 at <http://www.crin.org/resources/infoDetail.asp?ID=10227> accessed 20 Apr 2011.

a fundamentally norm-creating character; ii) widespread and representative state support including affected states; and iii) consistent state practice and general acceptance and recognition of the rule.⁴

6.3.1 The Creation

Because of the clear benefit of the BIC in safeguarding children's welfare and interests, states and international organizations have been quick to grasp and apply the principle that the usage has reached a universal level in various subject matters concerning children. The principle has become an intrinsic norm in many aspects of child-related matters, especially in custody and family relations, the most relevant subject of a child's life.

The formation of the BIC principle as a customary international law can be determined from the significant general and uniform practice as well as states' sense of obligation in observing the rule. Most importantly, the principle has a norm creating character that influences the state conduct.

6.3.1.1 Fundamentally Norm-Creating Character.

To be 'of a fundamentally norm-creating character', the provision must be capable of forming the basis of a general rule of law. Such provision must be able to guide and create the norm among the people. By being a guide, the provision will influence the people or the state to accept and recognize it. Meanwhile, a norm is created when the accepted provision is

⁴ North Sea Continental Shelf, Judgement, ICJ Reports 1969, 3, at para 72-4.

followed and becomes a practice among states. This means that state parties and non-state parties must demonstrate compatible behaviour with the provision with a view that they are bound by the norm. In other words, states have the *opinio juris* of its obligation under the provision. This element of norm creating character of the BIC can be shown as follows:

i. Near-Universal Ratification.

Article 3 should be regarded as an expression of a rule of the customary international law because, where stipulated, the UNCRC has had a history of coming into force less than a year after its adoption. The signing and the ratification of the UNCRC by almost all states except the USA and Somalia proved that states realise that it is a guide that they should follow. This has also strengthened the argument that the principle is being widely practised and accepted universally. This reflects states' acceptance of it as a general rule and indicates the generality of the practice, as can be seen from the ratification, acceptance, accession and succession of the UNCRC by 194 states.⁵ Crucial to this point is the fact that a state's ratification of the UNCRC without reservation of Article 3 and its incorporation into domestic laws, as shown in the coming section, are clear signals of acceptance and approval that the principle has become a customary rule.

⁵ See below, Table 1 List of Countries and Their Status of Ratification of International Conventions With Best Interests of Child Provision.

ii. Best Interests Principle Enshrined in International Treaties and Documents

Other international treaties also contain provisions of similar effect. After the UNCRC, the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (HAC) approved in 1993 provides the following:

Article 1

“The objects of the present Convention are –

*a) to establish safeguards to ensure that intercountry adoptions take place in the **best interests of the child** and with respect for his or her fundamental rights as recognised in international law;”*

Article 4

“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

*b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in **the child's best interests**;”*

This Convention regulates the manner in which inter-country adoption can take place and makes it the duty and responsibility of states and their agencies to resort to inter-country adoption only if such a move is in the best interests of the child. Since the Hague Convention on Inter-country Adoption governs how two countries should act in carrying out their duties, the ratification of the Convention can be classified as a state practice in which they have the intention to practise and comply with its provisions including the best interests rule when

dealing with inter-country adoption. A total of 89 countries signed and ratified the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.⁶

Another treaty, the UN Convention on the Rights of a Person with Disabilities, adopted in 2006, is the most recent international document to provide for the BIC in the following provisions:

Article 7

*“2. In all actions concerning children with disabilities, **the best interests of the child** shall be a primary consideration.”*

Article 12

*“4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect **the person’s rights and interests**.”*

Article 23

*“2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases **the best interests of the child** shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.”*

⁶ See Table 1 List of Countries and Their Status of Ratification of International Conventions With Best Interests of Child Provision.

A different group of children is covered and protected under this Convention. Its provisions give disabled children similar protection of their best interests as that enjoyed by able-bodied children but the special emphasis is made because of their exceptional circumstances that may make them more vulnerable, especially when other persons have to take actions and decisions on behalf of the disabled children occasionally or most of the time. This convention is signed and ratified by 152 countries.⁷

The Committee on the Rights of the Child, in giving its opinion on the interpretation and implementation of the Convention, asserted that the provisions of the UNCRC must be given effect in harmony with the principle of the best interests and the other three general principles. A literal analysis of the text of Article 3 UNCRC suggests that the article is merely enforcing a specific method to be followed by a decision-maker. The end or outcome should only be reached after the BIC have been given due consideration as required by the law.⁸ It also suggests that the provision can become a source of substantive right as it will be a guarantee that the rule will be applied each time a decision-maker is contemplating and deliberating on a decision that will affect children.⁹ Article 3 connotes the relation and interaction between child, the parent or guardian, and state organs. Apart from Article 3, the concept of the BIC also appears in six other articles of the UNCRC encompassing provisions governing family life and juvenile justice: Articles 9, 18, 20, 21, 37 and 40. In fact it is the guiding principle of

⁷ Table 1 List of Countries and Their Status of Ratification of International Conventions With Best Interests of Child Provision.

⁸ Jean Zermatten, "The Best Interests of the Child Literal Analysis, Function and Implementation" Working Report, Institut International Des Droit De Lenfant" (2010) 7.

⁹ Jean Zermatten, "The Best Interests of the Child Literal Analysis, Function and Implementation" Working Report, Institut International Des Droit De Lenfant" (2010) 7.

the UNCRC. As a guiding principle, it sets the norm on which other provisions shall be construed, and it influences the interpretation, application and implementation of the provisions of the UNCRC. This lends support to the requirement as a fundamentally norm-creating character of Article 3.

Of all the international instruments discussed above, the UNCRC provides for the principle of the BIC in the most diverse subject matter in relation to children. As it provides comprehensive rights to children, it is only natural that the principle appears in many provisions that call for the application of the principle. The ratification of the UNCRC by states can fairly be taken as recognition of the authority of the principle as a leading doctrine that directs states' conduct, in terms of both actions and decisions regarding children. It could also be taken as a signal of a state's sense of legal obligation. In general, all the provisions quoted above share some common features: firstly, the rule has to be applied only when a decision is to be made or during a procedure involving children, the outcome of which will have an effect on the children's interests; and, secondly, the BIC is to be one of the primary consideration at the very minimum.

6.3.1.2 Widespread and Representative State Support Including Affected States.

i. Best Interests Provisions in State/National Legislation Indicate Widespread and Representative Practice

States from all over the world have incorporated the principle in their national legislation, and the legislations of 10 countries are shown below to demonstrate that the practice is already widespread. In addition, Table 2 BIC Provision in Domestic Legislation of States below shows the list of 182 state parties to the UNCRC that have incorporated the provisions of BIC in the local legislation with 35 countries explicitly give a constitutional guarantee to the rule.

- a. Malaysia: the principle is embodied in the Child Act 2001¹⁰ and the Islamic Family Law Act, which have been enacted by all 13 states of Malaysia.¹¹
- b. Australia: the principle is embodied in legislation concerning children, such as the following: Section 60CA of the Commonwealth Family Law Act 1975; Children,

¹⁰ Child Act 2001:
Section 18: Any Protector or police officer who is satisfied on reasonable grounds that a child is in need of care and protection may take the child into temporary custody, unless the Protector or police officer is satisfied that—
*the taking of proceedings in relation to the child is undesirable in the **best interests** of the child;*
Section 30: (1) If a Court For Children is satisfied that any child brought before it under section 19 or 25 is a child in need of care and protection, the Court For Children may—
*(5) In determining what order to be made under subsection (1), the Court For Children shall treat **the best interests of a child** as the paramount consideration.*

6) Before making an order under subsection (1) or (4), the Court For Children shall consider and take into account any report prepared by the Protector which—
*(a) shall contain such information as to the family background, general conduct, home surrounding, school record and medical history of a child as may enable the Court For Children to deal with the case in **the best interests of the child**;*

¹¹ For example, the Islamic Family Law Act (Federal Territories) 1984:
Section 86. (1) Notwithstanding section 81, the Court may at any time by order choose to place a child in the custody of any one of the persons mentioned therein or, where there are exceptional circumstances making it undesirable that the child be entrusted to any one of those persons, the Court may by order place the child in the custody of any other person or of any association the objects of which include child welfare.
*(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the **welfare of the child** and, subject to that consideration, the Court shall have regard to—*
(a) the wishes of the parents of the child; and
(b) the wishes of the child, where he or she is of an age to express an independent opinion.

Youth and Families Act 2005 (Victoria); and Children Protection Act 1993 (South Australia).

c. Cyprus: the principle has been included in the draft of the Law for the Welfare, Care and Protection of Children.¹² The principle is also stipulated in the Refugee Law of 2007.

d. Iceland: Article 34 (2) of the Children's Act, No. 76/ 2003 provides for the principle to be considered in making custody decisions.

e. Italy: In its third periodic report to the Committee on the Rights of the Child, the stipulation of the principle in state legislation is explained and this includes the provision for children seeking asylum.¹³

f. Korea: the Civil Code of Korea contains the requirement to apply the principle of best interests in matters concerning children.¹⁴

g. Bahrain: the principle is already incorporated in a number of state legislations and will be included in the new Bill to provide for the rights and protection of children.¹⁵

h. Egypt: the UNCRC is considered part of Egyptian law by virtue of Article 151 of the Constitution of the Arab Republic of Egypt 1971 (as amended 2007), which provides that a treaty shall have the force of law in the country after conclusion,

¹² The Consolidated 3rd and 4th Periodic Report of Cyprus to the UN Committee on the Rights of the Child [Covering the period 2003-2007] p. 5

¹³ CRC, Third Periodic Report Of State Parties Due In 2003 (Consideration of Reports Submitted by State party under section 44 of the Convention, 2010) CRC/C/ITA/3-4, p. 32 < <http://www2.ohchr.org/english/bodies/crc/crcs58.htm>> accessed 15 May 2011.

¹⁴ CRC, Consolidated Third And Fourth Periodic Reports Of States Parties Due In 2008 Republic Of Korea (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, 2010) CRC/C/KOR/3-4, p. 9-10. < <http://www2.ohchr.org/english/bodies/crc/crcs58.htm>> accessed 15 May 2011.

¹⁵ CRC, Second and Third Periodic Reports Of States Parties Due In 1999 Bahrain (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, 2010) CRC/C/BHR/2-3, p. 26-27 < <http://www2.ohchr.org/english/bodies/crc/crcs58.htm>> accessed 15 May 2011

ratification and publication in accordance with the procedure. The Children Act No.12 of 1996 contains express reference to the principle of best interest.¹⁶

i. Seychelles: legislative provision of the principle can be found in the Children (Amendment) Act 2005 and the Children (Amendment) Act 1998.¹⁷

j. Finland: Finland has made a legislative reform to ensure compliance with the UNCRC and improve the condition of children.¹⁸ The Child Welfare Act 2007/ 417 defines and provides the general principle of the BIC.¹⁹

From the periodic reports submitted by state parties to the Committee on the Rights of the Child, it is clear that states are not only embodying the principle in legislation but are also striving to implement the provisions of the UNCRC, including the need to ensure that the BIC are not affected by its actions and decisions. The reports also demonstrate that the principle as provided under the UNCRC has been judicially applied by domestic courts.

¹⁶ CRC, Third And Fourth Periodic Reports Of States Parties Due In 2008 Egypt (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, 2010) CRC/C/EGY/3-4, p. 30 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/412/45/PDF/G1041245.pdf?OpenElement>> accessed 15 May 2011

¹⁷ CRC, Second, Third And Fourth Periodic Reports Of States Parties Due In 2007 Seychelles (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, 2010) CRC/C/SYC/2-4, p. 16- 17 < <http://www2.ohchr.org/english/bodies/crc/crcwg58.htm>> accessed 15 May 2011

¹⁸ CRC, Fourth Report Of States Parties Due In 2008 Finland (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, 2010) CRC/C/FIN/4, p.4 < <http://www2.ohchr.org/english/bodies/crc/crcwg58.htm>> accessed 15 May 2011

¹⁹ CRC, Fourth Report Of States Parties Due In 2008 Finland (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, 2010) CRC/C/FIN/4, p.26 < <http://www2.ohchr.org/english/bodies/crc/crcwg58.htm>> accessed 15 May 2011

6.3.1.3 Consistent State Practice and General Acceptance and Recognition of the Rule.

i. State Practice as Reflected in National Legislations and Actual Practice.

State practices all over the world are displaying a uniform practice of requiring the court to give the BIC either primary or paramount consideration when making custody decisions. The practice is common in the arrangement of alternative care, adoption, rehabilitation, juvenile justice and in the treatment of alien children, especially children seeking refuge. These practices can be deduced from a variety of resources including, but not limited to, the following: enactment of state legislation; state ratification of international treaties; state conduct in dealing with children; publication of state policies regarding the use of the principle; statement made by governments of states or their representatives and the application of the principle in national and international courts. In terms of actual practice, a multitude of state practices can be presented to support this first requirement of customary law creation, including judicial application and administrative practice.

ii. The Requirement to Give the BIC Primary Consideration in International Treaties Has Not Been Objected to.

Thus far, no objection or opposition has been published, aired, recorded or written on the rule. Indeed, the rule has emerged from a lower obligation, that is, a ‘welfare’ standard, a narrower term than the principle in question, to become a broader legal obligation. The current standard has been developed due to states’ recognition and acknowledgement that it is a duty and responsibility of states to do so to protect children. The lack of objections is also reflected in

the fact that none of the ratifying states have made reservations to Article 3 of the UNCRC. As for Article 9 of the UNCRC, Croatia made a reservation to this Article, but not on the basis of disagreement with the principle of the best interests.

Japan, however, made a declaration that the interpretation of Article 9 should not apply to cases where children are separated from their parents, according to the immigration laws of Japan.²⁰ Yugoslavia made a reservation to Article 9, stating that the domestic law of Yugoslavia allowed the state to make decisions depriving parents of their rights to raise their children without prior judicial determination. This reservation was made because the state could deprive parents of such rights even under administrative action, as provided under its internal legislation.²¹ Slovenia made a similar reservation to Article 9, which is not concerned with the best interests of the child.²² However, Iceland²³, Korea²⁴ and Bosnia²⁵ have withdrawn their reservations to Article 9. Similarly, the reservation is concerned with the

²⁰ "The Government of Japan declares that paragraph 1 of article 9 of the Convention on the Rights of the Child be interpreted not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law." p. 7

²¹ "The competent authorities (ward authorities) of the Socialist Federal Republic of Yugoslavia may, under article 9, paragraph 1 of the Convention, make decisions to deprive parents of their right to raise their children and give them an upbringing without prior judicial determination in accordance with the internal legislation of the SFR of Yugoslavia." (p. 17)

²² "The Republic of Slovenia reserves the right not to apply paragraph 1 of article 9 of the Convention since the internal legislation of the Republic of Slovenia provides for the right of competent authorities (centres for social work) to determine on separation of a child from his/her parents without a previous judicial review." (p.25)

²³ "With respect to article 9, under Icelandic law the administrative authorities can take final decisions in some cases referred to in the article. These decisions are subject to judicial review in the sense that it is a principle of Icelandic law that courts can nullify administrative decisions if they conclude that they are based on unlawful premises. This competence of the courts to review administrative decisions is based on Article 60 of the Constitution." (p. 23)

²⁴ On 16 Oct 2008, the Government of the Republic of Korea informed the Secretary-General that it had decided to withdraw the reservation in respect of Article 9, paragraph 3 made upon ratification. (p. 25)

²⁵ "The Republic of Bosnia and Herzegovina reserves the right not to apply paragraph 1 of article 9 of the Convention since the internal legislation of the Republic of Bosnia and Herzegovina provides for the right of competent authorities (guardianship authorities) to determine on separation of a child from his/her parents without a previous judicial review." p. 21

‘judicial review’ in Article 9 (1) and not the principle of the best interests of the child. No reservations have been made by any of the 186 state parties to Article 5 (b) and Article 16 (1) (d) of CEDAW, both of which contain references to the principle of BIC as a primordial²⁶ and paramount consideration.²⁷

iii. Judicial Decisions Relating to BIC

Several cases decided by state court are referred to show state practice in this matter. In England, apart from *ZH Tanzania*, discussed earlier, the principle is also applied in the case of *R (On the Application of SG and Others (Previous JS and Others)) v Secretary of State for Work and Pension*²⁸ the Supreme Court was posed with a question of whether it was lawful for the Secretary of State to make a regulation that impose a cap on the amount of welfare benefits on non- working households. It was argued that the Secretary of State has an obligation under section 6 of the Human Rights Act to treat the BIC as a primary consideration in making the regulation, as required under Article 3 of the UNCRC. The court is of the view that the cap has the effect of causing children of non- working household to lose the benefit and affect his/ her family life including the right to and thus is incompatible with the obligation to treat the BIC as primary consideration.

²⁶ Article 5. States Parties shall take all appropriate measures:

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

²⁷ Article 16. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

²⁸ [2015] UKSC 16

An Australian case, *Minister of State for Immigration and Ethnic Affairs v. Teoh*.²⁹ the respondent had entered Australia from Malaysia, on a temporary permit, and subsequently married his deceased brother's *de facto* wife. She had four children - including three fathered by his deceased brother - and a child was born of the marriage. Respondent's applied for a grant of resident status but pending the decision he was charged and convicted of a number of offences in connection heroin, and was sentenced to six years imprisonment. As a result, the delegate of the Minister refused the application for the grant of resident status on the basis that the applicant was not of good character. On application for review the Immigration Review Panel recommended against allowing the respondent's application because the "compassionate grounds" based on his relation with the wife and the children and the family life as there were insufficient reason oust his conviction for a serious crime of illegal possession of heroin. Thereafter, a deportation order was made against the respondent. The respondent applied to the Federal Court for an order of review of the deportation order. It was initially dismissed. Nevertheless, the Full Court of the Federal Court allowed the respondent's appeal on grounds of the delegate's failure to give proper consideration of the effect of the respondent's deportation on his family. It is in the best interests of the child that he should not be deported. The court also acknowledged that Australia's accession to the UNCRC had given rise to a legitimate expectation in the respondent's children that the application for resident status of their father would be treated in accordance with the principles of the UNCRC. The Minister's decision to refuse resident status was set aside so the minister appealed to the High Court of Australia. The High Court refers to Article 3(1) of the UNCRC declaring that, in all actions concerning children by all the organs of the states including the administrative bodies, "the best interests of the child shall be the primary consideration and thus the appeal was

²⁹ (1995) 128 A. L. R. 353.

dismissed for the failure of the delegates to take the interests of the child as a primary consideration.

In the case of *Baker v Canada (Minister of Citizenship and Immigration)*³⁰ the Supreme Court of Canada held that the principle of the BIC must be taken into consideration in the immigration application based on humanitarian and compassionate leave to remain. In another case, *Duka v Canada*³¹ the court reiterated that the BIC must be actively and seriously considered by decision makers. Explanation of the principle is also carried out in *Jiminez v Canada (Citizenship and Immigration)*³² in which the court recognised that immigration officer must pay a great deal of attention in considering application affecting refugee children but it is up to the immigration officer to decide the weight to be given to the consideration. The weight given to BIC in immigration application in Canada does not amount to primary consideration and this is a lower standard than imposed by the customary rule of best interests of the child. However these cases have helped to illustrate how the principle could be applied and its influence on the outcome of the trial. Meanwhile in *Mangru v. Canada (Minister of Citizenship and Immigration)* [2011] FC 779, the court found that the officer in charge of the applicant's application for a pre-removal risk assessment has failed to adequately assess the best interests of the applicant's children. It was wrong for the officer to incorporate her finding that "even though the children would experience hardship in starting a new life in Guyana, the hardship did not rise to the level of unusual and undeserved hardship" in the analysis of the best interests of the children. Furthermore no full assessment of the effect on

³⁰ [1999] 2 S.C.R. 817

³¹ (2010) FC 1071

³² (2012) FC 1407

the children of being removed from Canada to Guyana was made. This error has led to the wrong conclusion that the best interests of the child is in favour of the applicant's removal from Canada.

An example of the application of the BIC can also be seen when the court considers the question of sterilisation over mentally retarded child. The Australian Court emphasised on the principle of best interests of child and decided that sterilisation is only permitted with Court's order.³³ The same has been considered in New Zealand.³⁴ The concept is a primary consideration in New Zealand's cases relating to adoption³⁵, medical treatment³⁶ and immigration.³⁷ The same assessment is made in Singapore's case, where best interest of child become the crux of the reasoning for custody.³⁸ Meanwhile in Canada, the Canadian Supreme Court held that non-therapeutic sterilisation can never safely be said to be in the best interests of a person and so can never be authorised by a court.³⁹ In West India's case of *Naidike (Robert), Naidike (Timi) and Naidike (Faith) v Attorney-General*⁴⁰ relating to deportation of parents, the court viewed the need to balance reason for deportation against the BIC. In addition, Sri Lanka' Court of Appeal⁴¹ has also recognised the principle of best interests of child.⁴² In a Uruguay's case⁴³, the BIC were protected by the judge's refusal to authorize the

³³ *Secretary, Department Of Health And Community Services v JWB and Another* - (1992) 106 ALR 385

³⁴ *Re X* [1991] 2 NZLR 365.

³⁵ *Re Georgina Kennedy; an application to adopt a child* [2014] NZFLR 367, *Skelton v Family Court at Hamilton* [2007] 3 NZLR 368, *K v A-G* (2006) 25 FRNZ 413.

³⁶ *Re C; Hutt District Health Board v B [Guardianship: life support]* [2011] NZFLR 873.

³⁷ *Ye v Minister of Immigration* [2009] 2 NZLR 596.

³⁸ *AZB v AYZ* [2012] SGHC 108, *BG v BF* [2007] SGCA 32.

³⁹ *Re Eve* [1986] 2 SCR 388;

⁴⁰ *Naidike (Robert), Naidike (Timi) and Naidike (Faith) v Attorney-General* [2004] UKPC 49

⁴¹ *Jeyarajan v. Jeyarajan* (1999) 1 SLR 113

⁴² CRC, Third and fourth periodic report of States parties due in 2003 Sri Lanka, (Consideration of reports submitted by States parties under article 44 of the Convention), CRC/C/LKA/3-4 p.20

child's departure with the mother, and thus separation from the father, because of the potential psychological damage.⁴⁴

The case of European Court of Human Rights is referred to illustrate the position of BIC in its jurisdiction: *Hokkanen v. Finland*, 23 September 1994, Series A no. 299-A. This is a long battle for custody and access rights between a father and the maternal grandparents who have been looking after the child when she was 2 after the mother's death. After two years the grandparents inform the father that they do not intend to return the child. What follows after that is a series of arrangement to reconcile the father and the grandparents, application of custody, and right to have access with the child. During the period of about 6-7 years of the conflict, the grandparents persistently refused to follow court orders to allow the father to meet the child out of the their home, or order to return the child to the father denying the father the access while the authority has failed to enforce court order to compel the grandparents to comply or risk a fine. After a long period of absence and denied access, in the best interests of the child, the custody was transferred to the grandparents. The views of the child were sought and she is capable of forming her own views and chose not to see her father. Thus taking into consideration the length of the duration of the child's care with the grandparents and the views of the child, the custody was transferred to the grandparents and the access cannot be imposed on her. The case went to the European Courts of Human Rights

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSWE%2f5&Lang=en> accessed on 7 November 2014

⁴³ La Justicia Uruguay Judgment No. 152 of the Second Rota Court of Appeals of 3 October 2001

⁴⁴ CRC, Second periodic reports of States parties due in 1997 Uruguay (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/URY/2 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 November 2014.

when the father claim damages against the authority for their delay in making administrative decision relating to the case and failure to enforce the court order against the grandparents thus violated his right to respect for family life under Article 8 of the European Convention of Human Rights. Despite the illegal conduct of the grandparents who kept the child away from the father, the custody was granted to them because it is in the BIC to remain with the grandparents. The father's interest was outweighed by the interests of the child.

The ECHR in *Neulinger and Shuruk v. Switzerland*⁴⁵ pronounced a detailed consideration given to the principle of BIC. A child was abducted by the mother from Tel Aviv and secretly went to Switzerland fearing that the son will be brought to Lubavitch movement that she opposed to. The Lausanne District Justice of the Peace was of the view that there was a grave risk that the child's return to Israel would expose him to physical or psychological harm or otherwise place him in an intolerable situation. On appeal, the Vaud Cantonal Court it dismissed and finding of the earlier was affirmed.. The case went to the Swiss Federal Court which decided that the protection under Article 13 (b) of the Hague Convention was wrongly applied in the earlier court and thus ordered the child to be returned to Israel. An application to the ECHR was denied as the court found no violation of Article 8 if the child is returned to Israel. Hence the mother appealed to the Grand Chamber. To strike a balance between interests of the child, of the parents, and of public order, the court has made the BIC as the primary consideration. These interests are to maintain the relation with family and his development in a sound environment. The Hague Convention provides for the prompt return

⁴⁵ ([GC], No. 41615/07, ECHR 2010

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of the abducted child on the basis of BIC except where there is grave risk of exposing the physical or psychological harm. The Grand Chamber refers to the experts' reports that acknowledge the risk of the child's there would be a risk for return to Israel, and to avoid trauma, his return must be accompanied by his mother to avoid significant trauma. The Court also noted that the under the Hague Convention, a child cannot be returned if he has already settled in the new environment, in the present case the child has been living in Switzerland when he was 2 years old, he has Swiss nationality, attended municipal secular day nursery and a Jewish day nursery. During the hearing when he was 7, he attended a Swiss and spoke French. The court is aware of the possibilities of serious consequences if he is forced to move back to Israel. It was also made known to the court that the father's right of access was being restricted by the Israeli court and was unable to maintain his new family that lead to another divorce. If the mother is to return to Israel with the child, there is a possibility of being charged and imprisonment for violating the Israeli court order and this is not in the best interests of the child. Taking into account that the mother is also a Swiss national and the father's doubtful capacity to care for the child in the event that the mother is detained, his past behaviour and constrained financial capacity, it is justified to refuse the return of the child to Israel as it is not in the best interests of the child.

The case of *Uner and Rodrigues Da Silva, Hoogkamer v Netherlands* discussed at 2.3.2 are relevant example of the consideration of the BIC. Cases brought to the Inter-American Commission on Human Rights also show the application of the BIC rule. In *Fei v. Colombia*⁴⁶ (514/1992), ICCPR, A/50/40 vol. II (4 April 1995), the Committee accepts that the interests

⁴⁶ (514/1992), ICCPR, A/50/40 vol. II (4 April 1995).

and the welfare of the children are given priority in the proceedings which are initiated by the children of a divorced parent. In *Buckle v. New Zealand*⁴⁷ the Committee identified that, the State may decide on children removal from their parents' care entirely if that removal is in the BIC. The case of *Wayne Smith, Hugo Armendariz al. v. United States*,⁴⁸ recorded that the Committee decides that, in case of deportation, it must consider the BIC involved.

iv. State Legislation as Recognition of the Rule

When a state makes laws and regulations pertaining to certain matters, those actions may have resulted from its international obligation or its independent perception that it ought to practise certain things as such because it has a natural obligation to do so as, according to natural law, it is only fair to do it. The implementation and application of the principle of the BIC to be given primary consideration in state practice and national law has been taking place for many years, and this should be sufficient to support the conclusion that states take such actions because they feel obliged to do so. The fact that none of the ratifying states have made reservations to Article 3, and its status as a guiding principle of the Convention as admitted by many commentators, conveys a clear message that states acknowledge its legal status and feel obliged not to reserve the provision even though it will place a duty on the organs of the state as a whole. It is also argued that state practice in enacting statutes containing the rule or principle of the BIC is actually an *opinio juris*. States consider themselves bound by the principle of the BIC (whether or not it follows the ratification of the CRC); thus, its inclusion in state law displays the state's sense of obligation because the state makes laws for everyone to follow, including its agencies.

⁴⁷ (858/1999), ICCPR, A/56/40 vol. II (25 October 2000).

⁴⁸ Case 12.562, Report No. 81/10 (July 12, 2010).

Furthermore, to fortify the argument, a number of international committees and organisations lend support to the cause. For example, the Committee on the Rights of the Child supports the view that the principle has acquired the customary status. Its concluding observation and General Comment clearly reflect its stand on this matter. To the Committee, because of its almost universal ratification by 192 states the UNCRC has acquired the status of customary international law. Amnesty International also asserted that the Convention and its provisions have reached customary status.

v. The Establishment of the Office of Child Commissioner

The establishment of the Child Commissioner in states affected by refugee or states that receive refugees coming for resettlement is a form of state practice as well an *opinion juris* when it states its duty to protect children's right under the UNCRC which include the BIC. European countries, Canada, Australia and New Zealand set up the office of Commissioner for Children for the purpose of protecting and advancing the rights and interests of children and youth and to ensure that children and youth have access to services and that their complaints receive appropriate attention.⁴⁹ They are currently 41 independent children's right institution from 33 European countries which join the European Network of Ombudspersons for Children.⁵⁰ These are Office of the Human Rights Defender of the Republic of Armenia,⁵¹ Office of Commissioner for Human Rights of the Republic of Azerbaijan⁵² Belgium-Children's Rights Commissioner (Flemish)⁵³ Délégué général aux droits de l'enfant de la

⁴⁹ For instance ACY, Advocate for Children and Youth Newfoundland and Labrador <<http://www.childand youthadvocate.nl.ca/default.htm>> accessed 5 December 2014.

⁵⁰ ENOC, European Network of Ombudspersons for Children, available at http://enoc.eu/?page_id=210), accessed 4 December 2014.

⁵¹ www.ombuds.am

⁵² www.ombudsman.gov.az

⁵³ www.kinderrechten.be

communauté française de Belgique⁵⁴ Bosnia & Herzegovina-The Human Rights Ombudsman of Bosnia and Herzegovina/ Specialized Department on Children's Rights,⁵⁵ Ombudsman for Children of Republika Srpska,⁵⁶ Bulgaria-The Ombudsman of Republic of Bulgaria,⁵⁷ Croatia- Ombudsman for Children,⁵⁸ Cyprus- The Cypriot Commissioner for the Protection of Children's Rights,⁵⁹ Denmark-Danish Council for Children's Rights,⁶⁰ Estonia- The Office of the Chancellor of Justice/Children's Rights Department,⁶¹ Finland-Ombudsman for Children in Finland,⁶² France- Le Défenseur des Droits,⁶³ Office of the Public Defender of Georgia,⁶⁴ Greece- Greek Ombudsman,⁶⁵ Hungary- Parliamentary Commissioner for Civil Rights,⁶⁶ Iceland- The Ombudsman for Children,⁶⁷ Italy- Independent Authority for Children and Adolescents,⁶⁸ Ireland- Ombudsman for Children,⁶⁹ Latvia- Office of the Ombudsman of the Republic of Latvia,⁷⁰ Lithuania- Childrights Ombudsman,⁷¹ Luxemborg- Ombuds-Committee for the Rights of the Child,⁷² Malta- Commissioner for Children's Office,⁷³ Moldova- Centre For Human Rights,⁷⁴ Montenegro- Protector of Human Rights and Freedoms of Montenegro,⁷⁵ Norway- Ombudsman for Children (Barneombudet),⁷⁶ Poland-

⁵⁴ :<http://www.dgde.cfwb.be/>

⁵⁵ www.ombudsmen.gov.ba

⁵⁶ www.djeca.rs.ba

⁵⁷ www.ombudsman.bg

⁵⁸ www.dijete.hr

⁵⁹ www.childcom.org.cy

⁶⁰ www.boerneraadet.dk

⁶¹ www.lasteombudsman.ee

⁶² www.lapsiasia.fi

⁶³ www.defenseurdesdroits.fr

⁶⁴ www.ombudsman.ge

⁶⁵ www.synigoros.gr

⁶⁶ www.obh.hu

⁶⁷ www.barn.is

⁶⁸ www.garanteinfanzia.org

⁶⁹ www.oco.ie

⁷⁰ www.tiesibsargs.lv

⁷¹ www3.lrs.lt

⁷² www.ork.lu

⁷³ :www.tfal.org.mt

⁷⁴ www.ombudsman.md

⁷⁵ www.ombudsman.co.me

The Ombudsman for Children,⁷⁷ Serbia- Protector of Citizens of Serbia,⁷⁸ The Provincial Ombudsman of Vojvodina,⁷⁹ Slovakia- Office of the Public Defender of Rights,⁸⁰ Slovenia- The Human Rights Ombudsman of the Republic of Slovenia,⁸¹ Spain-Defensor del Pueblo Andaluz ,⁸² Office of the Catalan Ombudsman /Deputy Ombudsman for Children's Rights,⁸³ Valedor do Pobo de Galicia,⁸⁴ Sweden- The Ombudsman for Children in Sweden,⁸⁵ The Netherlands- De Kinderombudsman,⁸⁶ Ukraine- Ukrainian Parliament Commissioner for Human Rights,⁸⁷ UK- Children's Commissioner for England,⁸⁸ Northern Ireland Commissioner for Children and Young People,⁸⁹ Scotland's Commissioner for Children and Young People (SCCYP),⁹⁰ and Children's Commissioner for Wales.⁹¹

6.3.2 Analysis of the Customary Status of the Principle of Best Interests of the Child

The debates above have provided clear and strong support for the assertion that the principle of BIC has reached customary status. The examination of the three elements involved in determining whether a principle has become a customary international law shows that the principle is commonly found in national laws of various nations, embodied in international

76 www.barneombudet.no
77 www.brpd.gov.pl
78 www.ombudsman.rs
79 www.ombudsmanapv.org
80 www.vop.gov.sk
81 www.varuh-rs.si
82 www.defensor-and.es
83 www.sindic.cat/infants
84 www.valedordopobo.com
85 www.barnombudsmannen.se
86 www.dekinderombudsman.nl
87 www.ombudsman.gov.ua
88 www.childrenscommissioner.gov.uk
89 www.niccy.org
90 www.sccyp.org.uk
91 www.childcom.org.uk

treaties ratified by a majority of states, included in ‘soft laws’ and generally practised by states domestically and in intergovernmental relations.

There is enough evidence to conclude that the principle of the BIC should be treated as a customary international law and should thus be binding on all states. States’ practices in terms of legislation and administrative action constitute universal acceptance of the principle. It is also clear that the principle has been applied in a multitude of children-related issues including custody, family relations, alternative care, healthcare, criminal justice, disabled children, education, and survival. This study takes the view that it is safe to conclude that the principle has satisfied the requirement outlined in the North Sea Continental Shelf case. Hence, the principle shall be treated as an international custom and can be applied domestically.

6.4 MALAYSIA’S OBLIGATION AND DUTIES ARISING OUT OF THE CUSTOMARY RULE OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD.

As a customary rule developed from a treaty provision, the principle can only impose duties as imposed by Article 3 of the UNCRC. The duty that arises is the duty to make the BIC a primary consideration in the conduct of all the state’s organs in all areas affecting children. The authorities are bound to ensure that a child’s interests are evaluated together with other competing interests in matters affecting a child or group of children.⁹² The principle should be

⁹² Jean Zermatten, “The Best Interests of the Child Literal Analysis, Function and Implementation” Working Report, Institut International Des Droit De Lenfant” (2010) 2.

applied to all individual children and any group of children including mass groups of children, but it should not be used to justify any act that is violent, inhumane or in contravention of children's rights. For example, a state cannot claim that it is in the BIC to be prevented from going to school, receive corporal punishment, or be detained. The principle applies to all actions and decisions that affect children either directly or indirectly.

An important element of that duty is to give children the opportunity to express their views in order that their interests may be ascertained. It also means that the state must stop any current practice and amend laws if such practice and laws violate the rule. In relation to refugee and asylum-seeking children in Malaysia, the authorities are required to guarantee that the BIC are considered in any refugee-related matters.

6.5 MALAYSIA AS PERSISTENT OBJECTOR

There is no evidence to support any claim that Malaysia is a persistent objector to the principle before and after its formation. In fact, there is good and sufficient evidence to show Malaysia's compliance with the rule, as it has been part of the law and practice in Malaysia. This is stipulated in Islamic family law acts/enactments, the Law Reform (Marriage and Divorce) Act 1969 and the Child Act 2001. In contrast to the principle of *non-refoulement*, which relies entirely on Malaysia's practice without statutory authority, the present principle has been applied by the courts for many decades, especially in custody cases in the civil courts and the Syariah courts.⁹³ Although the use and provision of the principle under

⁹³ The application of the principle of the BIC and welfare of the child can be traced in custody cases as early as the 1950s. Numerous cases can be referred to. For cases concerning muslim children see *Mohamed v*

Malaysian law may not be exhausted, there has been no objection to the enactment of the provision. Moreover, consistent practice and application of the rule are commonly found.

6.6 CONCLUSION

This chapter has presented the argument that provision of the principle of BIC in Article 3 of the UNCRC has evolved into a customary international law and its binding effect on states regardless of their ratification or the status of the UNCRC in their national legal frameworks. In particular, the discussion in this chapter has shown that the provision of Article 3 is not only an endorsement and verification of the principle in general but most importantly, has also extended the application of the principle beyond the judicial platform.

By and large, this chapter has argued and concluded that refugee children do not simply *need* protection: as rights holders, they are *entitled* to it. Thus, in the case of children crossing international borders, host states are bound to base their actions and decisions, such as the treatment, consideration and screening of the children seeking refuge, on the principle of the best interests of the child. The position of refugee children should not be distinguished from

Aminah [1951] MLJ 146, 149; *Myriam v Mohamed Ariff* [1971] 1 MLJ 265; (1971) 3 JH 35; *Wan Abdul Aziz v Siti Aishah* (1975) 1 JH 47; (1977) 1 JH 50; *Zawiyah v Roslan* (1980) 1 JH (2) 102; *Mohamad Salleh lwn Azizah* (1984) 4 JH 212; *Rahanim v Adnan* (1996) 11 JH 165; *Nong Azman Shah v Ahood Thamar* (1996) 11 JH 165; *Hafizah Indra Abdullah v Jamaluddin Eusoff* (2004) 1 JH 47; and *Zarina v Hashim* (2007) 1 JH 143. For non-muslim children, reference can be made to *Re Satpal Singh, An Infant* (1957) 1 LNS 73; *Chuah Thye Peng & Anor v Kuah Huah Oong* (1978) 1 LNS 36; *Chan Bee Yen v Yap Kee Chong* (1988) 1 LNS 212; *Lim Fang Keng v Toh Kim Choo* (1995) 4 CLJ 733; *Amarapathi Periasamy v Muniandy Periasamy* (2006) 3 CLJ 533; and *Lai Meng v Toh Chew Lian* (2012) 10 CLJ 479.

that of other groups of children; thus, the application of the principle should not be exempted or restricted in refugee situations.

As a customary rule established from the provision of Article 3 of the UNCRC, the principle of the BIC should be observed by all state agencies as well as by private sectors. Its application as a custom extends beyond refugee situations to all matters concerning children. The ratification of the CRC is a demonstration of Malaysia's commitment to incorporating the provisions of the Convention into its legal framework through legislation and judicial application.

The fact that Malaysia has no asylum system and that the principle of the BIC is not part of its policy when dealing with children seeking refuge or refugee children should be seen as a violation of the rule rather than an objection to it. This study believes that, were the Malaysian authorities to apply the standards set out under the principle of the BIC in dealing with children seeking refuge and refugee children, more children would be protected and would thus be able to get on with their lives and survive in an environment that was safe and suitable for their development. In connection with the benefit provided by this principle for refugee children in Malaysia, in Chapter 7 this study analyses whether the principle of the BIC as a customary rule can be applied judicially to help improve the condition of refugee children

Table 1 List of Countries and Their Status of Ratification of International Conventions With Best Interests of Child Provision.

Participant	UNCRC ⁹⁴	Hague Adoption Convention	CRPD
Afghanistan	28 Mar 1994		18 Sep 2012 a
Albania	27 Feb 1992	12 Apr 2000	11 Feb 2013
Algeria	16 Apr 1993		04 Dec 2009
Andorra	2 Jan 1996	3 Jan 1997 a	11 Mar 2014
Angola	5 Dec 1990		19 May 2014 a
Antigua and Barbuda	5 Oct 1993		
Argentina	4 Dec 1990		02 Sep 2008
Armenia	23 Jun 1993 a	1 Mar 2007 a	22 Sep 2010
Australia	17 Dec 1990	25 Aug 1998	17 Jul 2008
Austria	6 Aug 1992	19 May 1999	26 Sep 2008
Azerbaijan	13 Aug 1992 a	22 Jun 2004 a	28 Jan 2009
Bahamas	20 Feb 1991		
Bahrain	13 Feb 1992 a		22 Sep 2011
Bangladesh	3 Aug 1990		30 Nov 2007
Barbados	9 Oct 1990		27 Feb 2013
Belarus	1 Oct 1990	17 Jul 2003	

⁹⁴ United Nations 'Convention on the Rights of the Child' (United Nations Treaty Collection) http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&lang=en accessed 18 Apr 2011

Belgium	16 Dec 1991	26 May 2005	02 Jul 2009
Belize	2 May 1990	20 Dec 2005 a	
Benin	3 Aug 1990		05 Jul 2012
Bhutan	1 Aug 1990		
Bolivia (Plurinational State of)	26 Jun 1990	12 Mar 2002	16 Nov 2009
Bosnia and Herzegovina	1 Sep 1993 d		12 Mar 2010
Botswana	14 Mar 1995 a		
Brazil	24 Sep 1990	10 Mar 1999	01 Aug 2008
Brunei Darussalam	27 Dec 1995		
Bulgaria	3 Jun 1991		22 Mar 2012
Burkina Faso	31 Aug 1990	11 Jan 1996	23 Jul 2009
Burundi	19 Oct 1990	15 Oct 1998	22 May 2014
Cape Verde	4 Jun 1992 a	1 Sep 2009 a	10 Oct 2011
Cambodia	15 Oct 1992 a	6 Apr 2007 a	20 Dec 2012
Cameroon	11 Jan 1993		
Canada	13 Dec 1991	19 Dec 1996	11 Mar 2010
Central African Republic	23 Apr 1992		
Chad	2 Oct 1990		
Chile	13 Aug 1990	13 Jul 1999	29 Jul 2008
China	2 Mar 1992	16 Apr 2005	01 Aug 2008
Colombia	28 Jan 1991	13 Jul 1998	10 May 2011
Comoros	22 Jun 1993		
Congo	14 Oct 1993 a		02 Sep 2014
Cook Islands	6 Jun 1997 a		08 May 2009 a

Costa Rica	21 Aug 1990	30 Oct 1995	01 Oct 2008
Côte d'Ivoire	4 Feb 1991		10 Jan 2014
Croatia	12 Oct 1992 d	5 Dec 2013 a	15 Aug 2007
Cuba	21 Aug 1991	20 Feb 2007	06 Sep 2007
Cyprus	7 Feb 1991	20 Feb 1995	27 Jun 2011
Czech Republic	22 Feb 1993 d	11 Feb 2000	28 Sep 2009
Democratic People's Republic of Korea	21 Sep 1990		
Democratic Republic of the Congo	27 Sep 1990		
Denmark	19 Jul 1991	2 Jul 1997	24 Jul 2009
Djibouti	6 Dec 1990		18 Jun 2012 a
Dominica	13 Mar 1991		01 Oct 2012
Dominican Republic	11 Jun 1991	22 Nov 2006 a	18 Aug 2009
Ecuador	23 Mar 1990	7 Sept 1995	03 Apr 2008
Egypt	6 Jul 1990		14 Apr 2008
El Salvador	10 Jul 1990	17 Sept 1998	14 Dec 2007
Equatorial Guinea	15 Jun 1992 a		
Eritrea	3 Aug 1994		
Estonia	21 Oct 1991 a	22 Feb 1997	30 May 2012
Ethiopia	14 May 1991 a		07 Jul 2010
Fiji	13 Aug 1993	29 Apr 2012 a	
Finland	20 Jun 1991	27 Mar 1997	
France	7 Aug 1990	30 Jun 1998	18 Feb 2010

Gabon	9 Feb 1994		01 Oct 2007
Gambia	8 Aug 1990		
Georgia	2 Jun 1994 a	9 Apr 1999 a	13 Mar 2014
Germany	6 Mar 1992	22 Nov 2001	24 Feb 2009
Ghana	5 Feb 1990		31 Jul 2012
Greece	11 May 1993	2 Sept 2009	31 May 2012
Grenada	5 Nov 1990		27 Aug 2014
Guatemala	6 Jun 1990	26 Nov 2002 a	07 Apr 2009
Guinea	13 Jul 1990 a	21 Oct 2003	08 Feb 2008
Guinea-Bissau	20 Aug 1990		24 Sep 2014
Guyana	14 Jan 1991		02 Sep 2014
Haiti	8 Jun 1995		23 Jul 2009 a
Holy See	20 Apr 1990		
Honduras	10 Aug 1990		14 Apr 2008
Hungary	7 Oct 1991	6 Apr 2005	20 Jul 2007
Iceland	28 Oct 1992	17 Jan 2000 a	
India	11 Dec 1992 a	6 Jun 2003	01 Oct 2007
Indonesia	5 Sep 1990		30 Nov 2011
Iran (Islamic Republic of)	13 Jul 1994		23 Oct 2009 a
Iraq	15 Jun 1994 a		20 Mar 2013 a
Ireland	28 Sep 1992	28 Jul 2010	
Israel	3 Oct 1991	3 Feb 1999	28 Sep 2012
Italy	5 Sep 1991	18 Jan 2000	15 May 2009
Jamaica	14 May 1991		30 Mar 2007

Japan	22 Apr 1994		20 Jan 2014
Jordan	24 May 1991		31 Mar 2008
Kazakhstan	12 Aug 1994	9 Jul 2010 a	
Kenya	30 Jul 1990	12 Feb 2007 a	19 May 2008
Kiribati	11 Dec 1995 a		27 Sep 2013 a
Kuwait	21 Oct 1991		22 Aug 2013 a
Kyrgyzstan	7 Oct 1994 a		
o People's Democratic Republic	8 May 1991 a		25 Sep 2009
Latvia	14 Apr 1992 a	9 Aug 2002	01 Mar 2010
Lebanon	14 May 1991		
Lesotho	10 Mar 1992	24 Aug 2012 a	02 Dec 2008 a
Liberia	4 Jun 1993		26 Jul 2012
Libya	15 Apr 1993 a		
Liechtenstein	22 Dec 1995	26 Jan 2009 a	
Lithuania	31 Jan 1992 a	29 Apr 1998 a	18 Aug 2010
Luxembourg	7 Mar 1994	5 Jul 2002	26 Sep 2011
Madagascar	19 Mar 1991	12 May 2004	
Malawi	2 Jan 1991 a		27 Aug 2009
Malaysia	17 Feb 1995 a		19 Jul 2010
Maldives	11 Feb 1991		05 Apr 2010
Mali	20 Sep 1990	2 May 2006 a	07 Apr 2008
Malta	30 Sep 1990	13 Oct 2004 a	10 Oct 2012
Marshall Islands	4 Oct 1993		

Mauritania	16 May 1991		03 Apr 2012 a
Mauritius	26 Jul 1990 a	28 Sept 1998 a	08 Jan 2010
Mexico	21 Sep 1990		17 Dec 2007
Micronesia (Federated States of)	5 May 1993 a		
Monaco	21 Jun 1993 a	29 Jun 1999 a	
Mongolia	5 Jul 1990	25 April 2000 a	13 May 2009 a
Montenegro	23 Oct 2006 d	9 Mar 2012 a	02 Nov 2009
Morocco	21 Jun 1993		08 Apr 2009
Mozambique	26 Apr 1994		30 Jan 2012
Myanmar	15 Jul 1991		07 Dec 2011 a
Namibia	30 Sep 1990		04 Dec 2007
Nauru	27 Jul 1994 a		27 Jun 2012 a
Nepal	14 Sep 1990		07 May 2010
Netherlands	6 Feb 1995	26 Jun 1998	
New Zealand	6 Apr 1993	18 Sept 1998 a	25 Sep 2008
Nicaragua	5 Oct 1990		07 Dec 2007
Niger	30 Sep 1990		24 Jun 2008
Nigeria	19 Apr 1991		24 Sep 2010
Niue	20 Dec 1995 a		
Norway	8 Jan 1991	25 Sept 1997	03 Jun 2013
Oman	9 Dec 1996 a		06 Jan 2009
Pakistan	12 Nov 1990		05 Jul 2011
Palau	4 Aug 1995 a		11 Jun 2013

Panama	12 Dec 1990		07 Aug 2007
Papua New Guinea	2 Mar 1993		26 Sep 2013
Paraguay	25 Sep 1990	13 May 1998 a	03 Sep 2008
Peru	4 Sep 1990	14 Sept 1995	30 Jan 2008
Philippines	21 Aug 1990	2 Jul 1996	15 Apr 2008
Poland	7 Jun 1991	12 Jun 1995	25 Sep 2012
Portugal	21 Sep 1990	19 Mar 2004	23 Sep 2009
Qatar	3 Apr 1995		13 May 2008
Republic of Korea	20 Nov 1991		11 Dec 2008
Republic of Moldova	26 Jan 1993 a	10 Apr 1998 a	21 Sep 2010
Romania	28 Sep 1990	28 Dec 1994	31 Jan 2011
Russian Federation	16 Aug 1990		25 Sep 2012
Rwanda	24 Jan 1991	28 Mac 2012 a	15 Dec 2008 a
Samoa	29 Nov 1994		
San Marino	25 Nov 1991 a	6 Oct 2004 a	22 Feb 2008
Sao Tome and Principe	14 May 1991 a		
Saudi Arabia	26 Jan 1996 a		24 Jun 2008 a
Senegal	31 Jul 1990	24 Aug 2011 a	07 Sep 2010
Serbia	12 Mar 2001 d	18 Dec 2013 a	31 Jul 2009
Seychelles	7 Sep 1990 a	26 Jun 2008 a	02 Oct 2009
Sierra Leone	18 Jun 1990		04 Oct 2010
Singapore	5 Oct 1995 a		18 Jul 2013
Slovakia	28 May 1993 d	6 Jun 2001	26 May 2010
Slovenia	6 Jul 1992	24 Jan 2002	24 Apr 2008

Solomon Islands	10 Apr 1995 a		
Somalia			
South Africa	16 Jun 1995	21 Aug 2003 a	30 Nov 2007
Spain	6 Dec 1990	11 Jul 1995	03 Dec 2007
Sri Lanka	12 Jul 1991	23 Jan 1995	
St. Kitts and Nevis	24 Jul 1990		
St. Lucia	16 Jun 1993		
St. Vincent and the Grenadines	26 Oct 1993		29 Oct 2010 a
State of Palestine	2 Apr 2014 a		02 Apr 2014 a
Sudan	3 Aug 1990		24 Apr 2009
Suriname	1 Mar 1993		
Swaziland	7 Sep 1995		24 Sep 2012
Sweden	29 Jun 1990	28 May 1997	15 Dec 2008
Switzerland	24 Feb 1997	24 Sept 2002	15 Apr 2014 a
Syrian Arab Republic	15 Jul 1993		10 Jul 2009
Tajikistan	26 Oct 1993 a		
Thailand	27 Mar 1992 a	29 Apr 2004	29 Jul 2008
The former Yugoslav Republic of Macedonia	2 Dec 1993 d	23 Dec 2008 a	29 Dec 2011
Timor-Leste	16 Apr 2003 a		
Togo	1 Aug 1990	12 Oct 2009 a	01 Mar 2011
Tonga	6 Nov 1995 a		
Trinidad and Tobago	5 Dec 1991		
Tunisia	30 Jan 1992		02 Apr 2008

Turkey	4 Apr 1995	27 May 2004	28 Sep 2009
Turkmenistan	20 Sep 1993 a		04 Sep 2008 a
Tuvalu	22 Sep 1995 a		18 Dec 2013 a
Uganda	17 Aug 1990		25 Sep 2008
Ukraine	28 Aug 1991		04 Feb 2010
United Arab Emirates	3 Jan 1997 a		19 Mar 2010
United Kingdom of Great Britain and Northern Ireland	16 Dec 1991	27 Feb 2003	08 Jun 2009
United Republic of Tanzania	10 Jun 1991		10 Nov 2009
United States of America		12 Dec 2007	
Uruguay	20 Nov 1990	3 Dec 2003	11 Feb 2009
Uzbekistan	29 Jun 1994 a		
Vanuatu	7 Jul 1993		23 Oct 2008
Venezuela (Bolivarian Republic of)	13 Sep 1990	10 Jan 1997	24 Sep 2013 a
Viet Nam	28 Feb 1990	1 Nov 2011	
Yemen	1 May 1991		26 Mar 2009
Zambia	6 Dec 1991		01 Feb 2010
Zimbabwe	11 Sep 1990		23 Sep 2013 a
TOTAL	194	89	152

a: accession

d: Succession

UNCRC: United Nations Convention on the Rights of the Child

Hague Adoption Convention: The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption

CRPD: Convention on the Rights of Persons with Disabilities

Table 2 BIC Provision in Domestic Legislation of States

NO.	STATE	CONSTITUTIONAL AND OTHER LEGISLATION
1.	Afghanistan ⁹⁵	Constitution (Art. 54) Juvenile Code (Art.24) Civil Code (Art. 242)
2.	Albania ⁹⁶	Law No. 9205 “On the Protection of Witnesses and Collaborators of Justice Law No. 9695 “On Adoption Procedures and the Albanian Adoption Committee” Code of Penal Procedure; and Family Code.
3.	Algeria ⁹⁷	Code of Civil and Administrative Procedure (code de procédure civile et administrative (CPCA).
4.	Andorra ⁹⁸	Qualified Act on Juvenile Justice Qualified Act on Justice of 22 April 1999 La Gavernera Children’s Residential Centre Regulation
5.	Angola ⁹⁹	Constitution (Art. 30) Family Code
6.	Antigua and Barbuda ¹⁰⁰	Adoption of Children Act Guardianship of Infants Act Maintenance of and Access to Children Act 2008 (Sec. 9)
7.	Argentina ¹⁰¹	Act No. 26.061 on Comprehensive Protection of the Rights of

⁹⁵ CRC, Initial reports of States parties due in 1996 Afghanistan (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/AFG/1, paragraph. 91-95 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAFG2f1&Lang=en> accessed 21 Nov 2014.

⁹⁶ CRC, Combined second, third and fourth periodic reports of States parties due in 2009 Albania (Consideration of the reports submitted by States parties under article 44 of the Convention) CRC/C/ALB/2-4 paragraph(s) 186- 199. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fALB%2f2-4&Lang=en> accessed 7 Nov 2014.

⁹⁷ CRC, Third and fourth periodic reports of States parties due in 2009. Algeria (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/DZA/3-4. Paragraph(s)346-363. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

⁹⁸ CRC, Second periodic reports of States parties due in 2003 Andorra (Consideration of the reports submitted by States parties under Article 44 of the Convention) CRC/C/AND/2 p. 8, 195-207. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

⁹⁹ CRC, Consolidated Second, third and fourth periodic reports of States parties due in 2008 Angola (Consideration of the reports submitted by States parties under article 44 of the Convention) CRC/C/AGO/2-4 Paragraph 81-85 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAGO%2f2-4&Lang=en> accessed 21 Jan 2014.

¹⁰⁰ CRC, Consolidated Second, Third And Fourth Periodic Reports Of States Parties Due In 2013 in Antigua and Barbuda, (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention), CRC/C/ATG/2-4, paragraph(s)46- 49 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fATG%2f2-4&Lang=en> accessed 21 Jan 2014.

¹⁰¹ CRC, Third And Fourth Periodic Reports Of States Parties Due In 2004 in Argentina, (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention), CRC/C/ARG/3-4, p.

		Children and Adolescents (Art. 3).
8.	Armenia ¹⁰²	Constitution of the Republic of Armenia (Art. 36) Family Code of the Republic of Armenia (art. 43) Criminal Code of the Republic of Armenia (Art. 170).
9.	Australia ¹⁰³	Commonwealth Family Law Act 1975, Children Youth and Family Act 2005 (Victoria) (Art. 10) Children's Protection Act 1993 (South Australia) Children and Young People Act 1999 Queensland Child Protection Act 1999
10.	Austria ¹⁰⁴	Federal Constitutional Law on the Rights of Children
11.	Azerbaijan ¹⁰⁵	Law of the Republic of Azerbaijan on the Rights of the Child (Art. 5) Law of the Republic of Azerbaijan of the Family Code (Art. 117)
12.	Bahrain ¹⁰⁶	2002 Code of Criminal Procedure Maintenance Fund Act Child's Rights and Education Bill
13.	Bangladesh ¹⁰⁷	The Children Act, 1974 and Children Rules, 1976, The National Children Policy 1994
14.	Barbados ¹⁰⁸	Family Law Act (S. 43)

13 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

¹⁰² CRC, Third and fourth periodic reports of States parties due in 2009 Armenia, (Consideration of the reports submitted by States parties under article 44 of the Convention) CRC/C/ARM/3-4 , paragraph(s)115-

127.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fARM%2f3-4&Lang=en> accessed 7 Nov 2014.

¹⁰³ CRC, Fourth periodic report of States parties due in 2007 Australia (Consideration of reports submitted by States parties under article 44 of the Convention), CRC/C/AUS/4, paragraph(s)70-78.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2f4&Lang=en> accessed 7 Nov 2014.

¹⁰⁴ CRC, Concluding observations on the combined third and fourth periodic report of Austria, adopted by the Committee at its sixty-first session CRC/C/AUT/CO/3-4 , paragraph. 5, 25-27 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUT%2fCO%2f3-4&Lang=en> accessed 21 Nov 2014

¹⁰⁵ CRC, Third and fourth periodic reports of States parties due in 2009 Azerbaijan, (Consideration of the reports submitted by States parties under article 44 of the Convention) CRC/C/AZE/3-4 , para. 74-88.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

¹⁰⁶ CRC, Second and third periodic reports of States parties due in 1999 Bahrain (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/BHR/2-3 paragraph 49, 109-110, 129- 138,195. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBHR%2f2-3&Lang=en> accessed 21 Nov 2014.

¹⁰⁷ CRC, Third and fourth periodic reports of States parties due in 2007Bangladesh(Consideration of reports submitted by states parties under article 44 of the convention) CRC/C/BGD/4, paragraph(s)83, 99- 104. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBGD%2f4&Lang=en> accessed on 19 Jan 2014.

¹⁰⁸ CRC, Initial Reports Of States Parties Due In 1992 Barbados (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/3/Add.45, para. 45-47. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f3%2fAdd.45&Lang=en accessed on 20 Nov 2014.

	The Minors Act Juvenile Offenders Act (chap. 138) Adoption Act (chap. 212) Child Care Board Act (chap. 381)
15. Belarus	Rights of the Child Act (s. 3)
16. Belgium ¹⁰⁹	Act of 24 April 2003 Act of 18 July 2006
17. Belize ¹¹⁰	Social Service Agencies Act (Ss. 2, 5, 13) Certified Institutions (Children's Reformation) Act (S. 2) Children's Code Families and Children Act (Ss. 4, 5, 29)
18. Bhutan ¹¹¹	Penal Code Civil and Criminal Procedure Code
19. Bolivia ¹¹²	Constitution (s. 60) Code for Children and Adolescents (Art. 6)
20. Bosnia and Herzegovina ¹¹³	Family Law of Brcko District of Bosnia and Herzegovina.
21. Botswana ¹¹⁴	Customary Law (Application and Ascertainment) Act of 1969 (s. 6) The Children's Act
22. Brazil ¹¹⁵	Federal Constitution (art. 227) Civil Code

¹⁰⁹ CRC, Third and fourth periodic report of States parties due in 2007 Belgium (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/BEL/3-4, paragraph(s)203-209.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBEL%2f3-4&Lang=en> accessed on 19 Nov 2014.

¹¹⁰ CRC, Second periodic report of States parties due in 1997 Belize (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/65/Add.29, paragraph(s)44-53.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f65%2fAdd.29&Lang=en> accessed on 22 Nov 2014.

¹¹¹ CRC, Second periodic reports of States parties due in 1997 BHUTAN (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/BTN/2, paragraph(s)80-86.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBTN%2f2&Lang=en> accessed on 5 Dec 2014.

¹¹² CRC, Fourth periodic reports of States parties due in 2007 Bolivia Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention CRC/C/BOL/4 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBOL%2f4&Lang=en> accessed on 5 Dec 2014.

¹¹³ CRC, Combined second to fourth periodic reports of States parties due in 2009 Bosnia and Herzegovina (Consideration of the reports submitted by States parties under Article 44 of the Convention) CRC/C/BIH/2-4p. 11 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

¹¹⁴ CRC, Initial reports of States parties due in 1997 Botswana (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) Crc/C/51/Add.9, Paragraph(s)122-128.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f51%2fAdd.9&Lang=en> accessed 23 Nov 2014

¹¹⁵ CRC, Initial Reports Of States Parties Due In 1992 Brazil (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/3/Add.65, paragraph(s)1180120. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

		Statute of the Child and Adolescent.
23.	Brunei ¹¹⁶	Children's Order 2000
24.	Bulgaria ¹¹⁷	Constitution Family Code
25.	Burundi ¹¹⁸	Code of Personal and Family Affairs
26.	Cape Verde ¹¹⁹	Constitution Decree No. 17/83 of 2 April (art. 90) Family Code (Art. 60)
27.	Cambodia ¹²⁰	Draft law on Juvenile Justice Law on Marriage and Family (Art. 73)
28.	Cameroon ¹²¹	Draft code on persons and the family Draft code on the protection of children
29.	Canada ¹²²	Citizenship Act (s. 5) Child, Youth, And Family Services Act Adoption Act (s. 3) Court Of Queen's Bench Act (s. 70) Family Law Rule (Rule 33(3)) Child Protection Act (Ss.2, 18) Child and Family Services Act (Ss.2, 3, 40) Child, Youth and Family Enhancement Act (s. 2)
30.	Central Africa Republic ¹²³	Draft Family And Persons Code (Art. 211) Recommendations of the State's General on Children and

- ¹¹⁶ CRC, Initial Reports Of States Parties Due In 1998 Brunei Darussalam (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/61/Add.5, paragraph(s)47- 54. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.
- ¹¹⁷ CRC, Second periodic reports of States parties due in 1998 Bulgaria (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/BGR/2, paragraph(s)13-14, 29, 40.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBGR%2f2&Lang=en accessed on 6 Nov 2014.
- ¹¹⁸ CRC, Second periodic report on the Convention on the Rights of the Child Burundi (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/BDI/2, paragraph(s)112-119.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBDI%2f2&Lang=en accessed on 7 Nov 2014.
- ¹¹⁹ CRC, Periodic reports due in 1994 Cape Verde (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) paragraph(s)69- 72.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f11%2fAdd.23&Lang=en accessed 7 Nov 2014.
- ¹²⁰ CRC, Consideration of reports submitted by States parties under article 44 of the Convention, paragraph(s)60. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKHM%2f2-3&Lang=en> accessed on 11 Nov 2014.
- ¹²¹ CRC, Second periodic reports of States parties due in 2000 Cameroon Consideration of reports submitted by States parties under article 44 of the Convention CRC/C/CMR/2, paragraph(s)59-61. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCMR%2f2&Lang=en> accessed on 7 Nov 2014.
- ¹²² CRC, Third and fourth periodic reports of States parties due in 2009 Canada (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/CAN/3-4, para. 40-44. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

	Youth, Decree No. 68/028 of 12 January 1968
31. Chad ¹²⁴	Act No. 07/PR/99 of 6 April 1999 Decree No. 100/PR/AFSOC of 18 June 1963 Criminal Code
32. Chile ¹²⁵	Political Constitution of the Republic (Art. 5) Filiation Act of 1998 National Policy and Integrated Plan of Action in favour of Children and Adolescents Act No. 19,620 of 1999
33. China ¹²⁶	Marriage Law (Art. 39) Law on the Protection of Minors (Art. 3)
34. Colombia ¹²⁷	Children's and Young Persons' Code (Act No. 1098 of 2006) (Art. 44).
35. Comoros ¹²⁸	Constitution Family Code Health and Social Welfare Code
36. Congo ¹²⁹	Family Code (Art. 4, 325) Criminal Code Child Protection Code
37. Cook Islands ¹³⁰	Prevention of Juvenile Crime Act 1968 Matrimonial Property Act 1976 (s. 26)

¹²³ CRC, Initial reports of States parties due in 1994 (Consideration of Reports Submitted By states Parties Under Article 44 of the Convention) CRC/C/11/Add.18, para. 69- 73. Accessed 7 Nov 2014.

¹²⁴ CRC, Second periodic reports of States Parties due in 1997 Chad (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/TCD/2, paragraph(s)68-71. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTCD%2f2&Lang=en accessed 7 Nov 2014.

¹²⁵ CRC, Third periodic reports of States parties due in 1997 Chile Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, CRC/C/CHL/3 para. 45- 47, 50-51. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHL%2f3&Lang=en> accessed on 11 Nov 2014.

¹²⁶ CRC, Third and fourth periodic reports of States parties due in 2009 China (Consideration of reports submitted by States parties under article 44 of the Convention)CRC/C/CHN/3-4, paragraph(s)42- 45. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHN%2f3-4&Lang=en> accessed on 11 Nov 2014.

¹²⁷ CRC, Fourth and fifth periodic reports of States parties due in 2011 Colombia (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/COL/4-5, paragraph(s)89-90.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOL%2f4-5&Lang=en> accessed 7 Nov 2014.

¹²⁸ CRC, Initial reports of States parties due in 1995 Addendum Islamic Federal Republic Of The Comoros (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention)CRC/C/28/Add.13, paragraph(s)60- 62.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f28%2fAdd.13&Lang=en> accessed 7 Nov 2014.

¹²⁹ CRC, Combined second, third and fourth periodic reports of States parties due in 2010 Congo Consideration of reports submitted by States parties under article 44 of the Convention CRC/C/COG/2-para. 4, 29, 162- 168. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOG%2f2-4&Lang=en> accessed 7 Nov 2014.

¹³⁰ CRC, Initial reports of States parties due in 1999 Cook Islands (Consideration of reports submitted by States parties under article 44 of the Convention)CRC/C/COK/1, paragraph(s)137-146.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOK%2f1&Lang=en> accessed on 11 Nov 2014.

	Infants Act 1908 (s. 2)
	Cook Islands Act 1915 (s. 461, 503)
	Protection of Children Ordinance 1954
38. Costa Rica ¹³¹	Children and Adolescents Code General Act on Comprehensive Services Centres (Act No. 8017 of 29 August 2000) Act on the Application of Juvenile Criminal Penalties, Act N° 8131 (art. 4)
39. Côte d'Ivoire ¹³²	Act No. 83-802 of 2 August 1983 Act No. 90-437 of 29 May 1990 Implementation Decree of 2 October 1991
40. Croatia ¹³³	Family Act (Art. 26, 230, 294) Act on the Protection against Family Violence Act on Juvenile Courts (Art. 5) Foreign Act (Art. 67) Act on Police Affairs and Authorities (2009)
41. Cuba ¹³⁴	Public Prosecution Service Act (Law No. 87/97).
42. Cyprus ¹³⁵	Draft Law of the Welfare, Care and Protection of Children Refugee Law of 2007 (s. 9).
43. Czech Republic ¹³⁶	Family Act Juvenile Justice Act Asylum Act
44. Democratic People's Republic of Korea ¹³⁷	The Constitution (Art. 8) Family Law (art. 22) Law on the Nursing and Upbringing of Children

¹³¹ CRC, Fourth periodic report of States parties due in 2007 Costa Rica (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/CRI/4, paragraph(s)68, 165, 211-248. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCRI%2f4&Lang=en> accessed on 11 Nov 2014.

¹³² CRC, Initial Reports Of States Parties Due In 1993 Addendum Côte D'ivoire (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/8/Add.41, paragraph(s)127 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f8%2fAdd.41&Lang=en> accessed on 11 Nov 2014

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¹³⁴ CRC, Second Periodic Reports Of States Parties Due In 1998 Cuba (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/CUB/2, paragraph(s)35, 65. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

¹³⁵ CRC, The consolidated 3rd and 4th Periodic Report of Cyprus to the UN Committee on the Rights of The Child [Covering the period 2003-2007] para. 3, 5, 9, 55, 124-5, 179. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCYPR%2f3-4&Lang=en> accessed 7 Nov 2014.

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¹³⁷ CRC, The combined third and fourth periodic reports of States parties due in 2007 Democratic People's Republic Of Korea Consideration Of Reports Submitted By States Parties Under Article 44 Of The

		Education Law
45.	Democratic Republic of the Congo ¹³⁸	Act No. 004/2001 of 20 July 2001
46.	Denmark ¹³⁹	Administration of Justice Act Act on Parental Responsibility (Act No. 499 of 6 June 2007) Social Services Act Care Placement Reform
47.	Djibouti ¹⁴⁰	Family Code (Art. 170)
48.	Dominica ¹⁴¹	Maintenance Act (s. 12) Children and Young Persons Act (s. 9) Adoption of Infants Act Sexual Offences Act No. 1 of 1998 Guardianship of Infant Act.
49.	Dominican Republic ¹⁴²	Act No. 136-03
50.	Ecuador ¹⁴³	Constitution (Art. 48)
51.	Egypt ¹⁴⁴	Constitution of the Arab Republic of Egypt 1971 (as amended 2007) (Art. 151) Children Act No. 12 of 1996
52.	El Salvador ¹⁴⁵	Family Code (art. 350)

- Convention CRC/C/PRK/4, paragraph(s)63- 72, 151.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPRK%2f4&Lang=en accessed on 11 Nov 2014.
- ¹³⁸ CRC, Second periodic reports of States parties due in 1997 Democratic Republic Of The Congo (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/COD/2, paragraph(s)94. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOD%2f2&Lang=en> accessed on 11 Nov 2014.
- ¹³⁹ CRC, Fourth period report of States parties due in 2008 Denmark (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/DNK/4, para. 56- 89. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.
- ¹⁴⁰ CRC, Second periodic reports of States parties due in 1998 Djibouti (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/DJI/2, paragraph(s)16, 91- 94, 166, 291. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fDJI%2f2&Lang=en> accessed on 11 Nov 2014.
- ¹⁴¹ CRC, Initial reports of States parties due in 1993 Dominica Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention CRC/C/8/Add.48, paragraph(s)87- 94 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f8%2fAdd.48&Lang=en> accessed on 11 Nov 2014.
- ¹⁴² CRC, Second Periodic Reports Of States Parties Due In 1998 Dominican Republic (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/DOM/2, para. 326-7. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014
- ¹⁴³ CRC, Fourth Periodic Reports Of States Parties Due In 2007 Ecuador (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/ECU/4, para. 95-8. <http://Tbinternet.Ohchr.Org/_Layouts/Treatybodyexternal/Tbsearch.Aspx?Lang=En> Accessed 7 Nov 2014.
- ¹⁴⁴ CRC, Third and Fourth Periodic Reports of States Parties Due In 2008 Egypt (Consideration of Reports Submitted By States Parties Under Article 44 of the Convention, 2010) CRC/C/EGY/3-4, para. 101.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

		Juvenile Criminal Justice Act
53.	Equatorial Guinea ¹⁴⁶	Constitution Spanish Civil Code
54.	Eritrea ¹⁴⁷	Transitional Civil Code of Eritrea
55.	Estonia ¹⁴⁸	Family Act, Child Protection Act (s. 3) Means of Influencing Minors Act Social Welfare Act (s. 25)
56.	Ethiopia ¹⁴⁹	Family Code (art. 113)
57.	Fiji ¹⁵⁰	Employment Relations Promulgation 2007 Family Law Act (120-122) Juveniles Act Adoption Act Cap 58 Marriage Act (Amendment) Decree 2009
58.	Finland ¹⁵¹	Child Welfare Act 2007/417
59.	France ¹⁵²	Law of March 2002 Law No. 2004-1 of 2 January 2004 Law No. 2004-439 of 26 May 2004 Order of 4 July 2005 Law of 5 March 2007

¹⁴⁵ CRC, Third and fourth periodic reports by States parties due in 2007 El Salvador (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/SLV/3-4, paragraph(s)38, 322. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSLV%2f3-4&Lang=en> accessed on 11 Nov 2014.

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¹⁴⁷ CRC, Fourth periodic reports of States parties due in 2011 Eritrea (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/ERI/4, para. 109- 125. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCOL%2f4-5&Lang=en> accessed 7 Nov 2014

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¹⁵⁰ CRC, Second to fourth periodic reports of States parties due in 2010 FijiConsideration of reports submitted by States parties under article 44 of the Convention CRC/C/FJI/2-4, paragraph(s)19, 53-8.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fFJI%2f2-4&Lang=en> accessed on 11 Nov 2014.

¹⁵¹ CRC, Fourth Reports of States Parties Due In 2008 Finland (Commission of Reports Submitted By States Parties Under Article 44 Of the Convention, 2010) CRC/C/FIN/4, para. 3, 39, 57, 59- 65, 122-131, 142, 144, 148, 153, 155, 158, 181, 193, 195, 197, 206, 221, 239, 374, 376-7, 403-4, 427-433. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

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	Code for Social Action and the Family
60. Gabon ¹⁵³	Civil Code (Art 273-275)
61. Gambia ¹⁵⁴	Children Act (s. 3, 4, 161)
62. Georgia ¹⁵⁵	Civil Code (Art. 1198) Marriage and Family Code
63. Germany ¹⁵⁶	Basic Law Child and Youth Welfare Further Development Act Act Facilitating Family-Court Measures in Cases of Danger to the Best Interests of the Child Draft of a Child Protection Act
64. Ghana ¹⁵⁷	Constitution Children Act (s. 2, 72, 105) Juvenile Justice Act Matrimonial Causes Act, 1971
65. Greece ¹⁵⁸	Civil Code (Art. 1511)
66. Grenada ¹⁵⁹	Proposed Act to Govern the Care and protection of Children in Grenada.
67. Guatemala ¹⁶⁰	Comprehensive Protection Act (s. 5)

¹⁵³ CRC, Initial reports of States parties due in 1996 Addendum Gabon Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention CRC/C/41/Add.10, para. 92-6. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f41%2fAdd.10&Lang=en> accessed on 11 Nov 2014.

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¹⁵⁸ CRC, Second and third periodic reports of States parties due in 2000 Greece (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/GRC/2-3, para.87 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGRC%2f2-3&Lang=en> accessed on 11 Nov 2014.

¹⁵⁹ CRC, Initial reports of States parties due in 1992 Addendum Grenada (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/3/Add.55, paragraph(s)48. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f3%2fAdd.55&Lang=en> accessed on 11 Nov 2014.

¹⁶⁰ CRC, Fourth periodic reports of States parties due in 2006 Guatemala (Consideration of reports submitted by States parties under article 44 of the Convention)CRC/C/GTM/3-4, paragraph(s)49, 58, 59, 60-6, 74, 82, 148, 152 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGTM%2f3-4&Lang=en> accessed 7 Nov 2014.

	Comprehensive Protection of Children and Adolescents (Art. 22)
68. Guinea ¹⁶¹	Civil Code (S. 403) Criminal Code (art. 341) Act No. L/2001/021/DN of 10 December 2001 Labour Code (Art. 5, 148)
69. Guyana ¹⁶²	Constitution (art. 38B) Protection of Children Act 2009 (Act No. 17 2009) (s. 3). Adoption of Children Act 2009 (Act No. 18 2009) Child Care and Development Services Bill Custody; Access, Guardianship and Maintenance Bill
70. Haiti ¹⁶³	The Constitution (Art. 261)
71. Honduras ¹⁶⁴	Article 142 of the Code on Children and Adolescents
72. Hong Kong ¹⁶⁵	Guardianship Of Minors Ordinance Powers of District Court
73. Hungary ¹⁶⁶	Child Protection Act 2012 Act 111 of 1952 on Civil Proceedings Act XXII of 1992 on the Labour Code Civil Code's Family Law Book
74. Iceland ¹⁶⁷	Children Act, No 76/2003
75. India ¹⁶⁸	Constitution of India (Art. 14, 24, 39)

¹⁶¹ CRC, Second periodic reports of States parties due in 1997 Guinea (Consideration of reports submitted by States parties under article 44 of the Convention)CRC/C/GIN/2, para. 29- 42, 157.http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGIN%2f2&Lang=en accessed 7 Novemebr 2014.

¹⁶² CRC, Combined second to fourth periodic reports of States parties due in 2008 Guyana (Consideration of the reports submitted by States parties under article 44 of the Convention CRC/C/GUY/2-4, paragraph(s)63-7, 80-2. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGUY%2f2-4&Lang=en> accessed on 11 Nov 2014.

¹⁶³ CRC, Initial reports of States parties due in 1997 Haiti (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/51/Add.7, para. 50- 60, 115.<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f51%2fAdd.7&Lang=en> accessed on 11 Nov 2014.

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¹⁶⁸ CRC, Second periodic reports of States parties due in 2000 India (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/93/Add.5 paragraphs 203-218<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f93%2fAdd.5&Lang=en> accessed 12 March 2014.

76. Iran ¹⁶⁹ Republic Of)	Civil Law (Art. 1173, 1184)
77. Iraq ¹⁷⁰	Minors Welfare Act Juvenile Welfare Act Personal Status Act No 188 1959 Welfare of Minors Act No 78.
78. Ireland ¹⁷¹	Irish Constitution Child Care Act, 1991 (S. 3) Child Care (Placement of Children in Residential Care) Regulations, 1995 (SI No. 259/1995) Child Care (Placement of Children in Foster Care) Regulations, 1995 (SI No. 260/1995) Child Care (Placement of Children with Relatives) Regulations, 1995 (SI No. 261/1995) Child Care (Standards in Children's Residential Centres) Regulations, 1996 (SI No. 397/1996) Child Care (Special Care) Regulations, 2004 (SI No. 550/2004) Children (Family Welfare Conference) Regulations, 2004 (SI No. 549/2004) National Standards for Foster Care (2003) National Standards for Special Care Units (2001) and Guardianship of Infants Act, 1964
79. Israel ¹⁷²	Amendment No. 6 to the Penal Law 5737-1977 Amendment No. 14 to the Youth Law (S. 1(B) and S.18 (a)) Amendment No. 9 to the Youth Employment Law 5713-1953 (S. 27F(a), (b), (c), S. 27G(a), (b)) Legal Capacity and Guardianship Law 5722-1962 (S. 24) Amendment No. 12 of the Legal Capacity Law (S. 35 (b)) Child Adoption Law (S. 28-36(a))

¹⁶⁹ CRC, Second periodic reports of States parties due in 2001 Islamic Republic Of Iran (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/104/Add.3, paragraph(s)21-8. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f104%2fAdd.3&Lang=en> accessed on 11 Nov 2014.

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80. Italy ¹⁷³	Law 54 of 8 Feb 2006 Italian Civil Code Law 149 of 28 March 2001 Legislative Decree of 140 of 30 May 2005 Implementation of Directive 2003/9EC.
81. Jamaica ¹⁷⁴	Child Care and Protection Act with a Children's Advocate (First Schedule)
82. Japan ¹⁷⁵	Japanese Constitution Civil Code Child Welfare Law (Art. 11) Maternal and Child Health Law Law on Punishing Acts related to Child Prostitution and Child Pornography, and on Protecting Children (Art. 1) Minimum Standards for Child Welfare Facilities (Ministerial Ordinance) Law for Determination of Family Affairs Rules for Determination of Family Affairs Juvenile Law Juvenile Classification Homes Treatment Regulations Juvenile Training School Treatment Regulations Child Abuse Prevention Law
83. Jordan ¹⁷⁶	Interim Personal Status Code (Act No. 36 of 2010) Criminal Procedure Code Regulation No 49 of 2009 (Art. 17) Children's Right Bill, and Juveniles Bills of 2011
84. Kazakhstan ¹⁷⁷	Children's Rights Act Marriage and the Family Act Education Act (Art. 8(4)) Act on Social, Medical and Educational Support for Children

¹⁷³ CRC, Third periodic reports of States parties due in 2003 Italy, (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/ITA/3-4, paragraph(s)135-144<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2f2&Lang=en CRC/C/IRL/2> accessed 7 Nov 2014.

¹⁷⁴ CRC, Third and fourth periodic reports of States parties due in 2008 Jamaica (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/JAM/3-4, para. 116-120<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

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		with Special Needs Labour Code Code on Public Health and the Health-care System
85.	Kenya ¹⁷⁸	Draft Constitution of Kenya (S. 40(4)) Children Act (S. 4(2) and S. 6(1))
86.	Korea ¹⁷⁹	Civil Code of Korea.
87.	Kuwait ¹⁸⁰	Kuwaiti Personal Status Act No. 51 of 1984
88.	Lao People's Democratic Republic ¹⁸¹	Constitution Act on the Family Code of Criminal Procedure Act on the Family Register Education Act (Art 4, 8, 23, 45) Act on Health Preventive Medicine and Promoting Health Act on the Family (Art 23, 30) Nationality Act Code of Civil Procedure Criminal Code (Art 17)
89.	Latvia ¹⁸²	Civil Procedure Law Law on the Protection of the Rights of the Child on 17 March 2005 (S. 6) Latvian Administrative Violations Code
90.	Lebanon ¹⁸³	Law for implementing sanctions No. 463 dated 17/9/2002 Personal Status Law (Art 122(e)) Shariaa Law Penal Code
91.	Lesotho ¹⁸⁴	1993 Constitution of Lesotho (Art. 28(j))

¹⁷⁸ CRC, Second periodic reports of States parties due in 1997 Kenya (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/KEN/2 paragraph(s)3, 133-144, 256 and 305 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKEN%2f2&Lang=en> accessed on 11 Feb 2014.

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92. Liberia ¹⁸⁵	Children's Bill and Children Law.
93. Libya ¹⁸⁶	Child Protection and Welfare Ordinance in 1991, Act No. 17 of 1992 (Art. 82) Child Protection Act No. 5 of 1997 Social Security Act No. 13 of 1980 (Art. 1) Penal Code
94. Liechtenstein ¹⁸⁷	Liechtenstein Code of Criminal Procedure.
95. Lithuania ¹⁸⁸	Code of Administrative Offences (Art. 181) Legal Status of Alien and Civil Code
96. Luxembourg ¹⁸⁹	Youth Act (Art. 2(2))
97. Madagascar ¹⁹⁰	Law No. 2007-023 (Art. 48)
98. Malawi ¹⁹¹	Constitution Child (Care, Protection and Justice) Bill Children and Young Persons Act
99. Malaysia ¹⁹²	Child Act 2001 (Ss. 18a and 30)

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101. Mali ¹⁹⁴	Constitution Child Protection Code (Art. 3, 7, 94) Marriage and Guardianship Code (Art. 12, 86) Social Welfare Code (Art. 9) Criminal Code Code of Criminal Procedure Act concerning the age of criminal responsibility
102. Malta ¹⁹⁵	Processing of Personal Data (Protection of Minors) Regulations (Legal Notice 125 of 2004)
103. Marshall Islands ¹⁹⁶	Adoption Legislation
104. Mauritania ¹⁹⁷	Personal Status Code (Act No. 2001-052 of 19 July 2001) the Code Civil Mauricien (Art. 371)
105. Mauritius ¹⁹⁸	Ombudsperson for Children Act 2003 (S. 5(b))
106. Mexico ¹⁹⁹	Constitution Act on the Protection of the Rights of Children (Art. 45)

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107. Micronesia (Federated States of) ²⁰⁰	Federated States of Micronesia Code (Art. 1105) Federated States of Micronesia Bill of Rights
108. Monaco ²⁰¹	Sovereign Ordinance of 1 September 1993 Act No. 1.336 of 12 July 2007
109. Mongolia ²⁰²	Constitution (Art. 16(11)) Family Code (Art. 4, and 25) Law on Education Law on Primary and Secondary Education Law on Protection of Child Rights (Art. 4(2))
110. Montenegro ²⁰³	Law on Family (Art. 5, 80, 123)
111. Morocco ²⁰⁴	Act on Kafalah Act No. 02-03 On The Entry And Residence Of Foreign Nationals In Morocco And Illegal Emigration And Immigration Family Code (Art. 166) Code of Criminal Procedure
112. Mozambique ²⁰⁵	Constitution Family Law (Art. 313)
113. Myanmar ²⁰⁶	1993 Child Law 2001 Rules related to the Child Law
114. Namibia ²⁰⁷	Constitution (Art. 15)

²⁰⁰ CRC, Initial reports of States parties due in 1995 Addendum Federated States Of Micronesia (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/28/Add.5 paragraph(s)64-80, 133, 136 < http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f28%2fAdd.5&Lang=en> accessed on 11 Feb 2014.

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116. New Zealand ²⁰⁹	Care of Children Act 2004 Young Persons and Their Families Act 1989
117. Nicaragua ²¹⁰	Responsible Parenthood Act (Art. 2, and 22) Code on Children and Adolescents.
118. Niger ²¹¹	Order No. 99-11 of 14 May 1999 Children's Code
119. Nigeria ²¹²	Child's Rights Act 2003 (S. 1) Prohibition of Child Trafficking by Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 Edo State Law on Female Genital Mutilation (FGM)
120. Niue ²¹³	Niue Act 1966 (S. 69)
121. Norway ²¹⁴	Children Act Immigration Act
122. Oman ²¹⁵	Code of Criminal Procedure

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		Employment Act
		Civil Status Act
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123. Pakistan ²¹⁶		Child Protection Bill
		Guardians and Wards Act 1890
124. Palau ²¹⁷		Palau National (Legal) Code (S. 21, 34, 34)
125. Panama ²¹⁸		Family Code
		Act No. 61 2008 (Art. 3)
126. Papua New Guinea ²¹⁹	New	Adoption of Children Act (S. 5)
		Customs Recognition Act (S. 3, 47)
		Matrimonial Causes Act (S. 74)
127. Paraguay ²²⁰		Constitution
		Children's Code
128. Peru ²²¹		Children's and Adolescents' Code (S. 45)
129. Philippine ²²²		Department Order No. 12 series of 2001
		Administrative Order No. 08 Series of 2004

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131. Portugal ²²⁴		Portuguese Constitution Civil Code
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133. Republic of Korea ²²⁶	of	Civil Code (Art. 837) Child Welfare Act (Art. 3) Social Welfare Services Act (Art. 43)
134. Republic of Moldova ²²⁷	of	Family Code Criminal Code Procedure
135. Republic of Guinea-Bissau ²²⁸	of	Code of Civil Procedure
136. Romania ²²⁹		Law 272/2004 On The Protection And Promotion Of The

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137. Russian Federation ²³⁰	Family Code (Art. 69) Fundamentals of Health-Care Legislation Education Act Federal Act on Additional Guarantees of Social Protection Orphans and Children deprived of Parental Care Federal Act on Social Protection for Persons with Disabilities, the Federal Refugees Act Federal Act on the Foundations of Social Services (Art. 6) Federal Act on Basic Guarantees of Children's Rights.
138. Rwanda ²³¹	Rwanda Constitution (Art. 28) (Art. 26) Penal Code, Law No. 22/99 of 12 Nov 1999 to supplement Book one of the Civil Code (Art. 75) Law No. 42.1988 of 27 Oct 1988 Instituting the Preliminary Title and the First Book of the Civil Code Law No. 27/2001 of 28 April 2001 Relating to Rights and Protection of the Child against Violence (Art. 7 and 9)
139. Samoa ²³²	Constitution of the Independent State of Western Samoa Act 1960 Child Care and Protection Bill 2013 Criminal Procedure Act
140. San Marino ²³³	San Marino Penal Code Law No. 21 of 3 May 1977 on the Social and Health Care Service, and Law No. 49/86 (Art. 86)
141. Sao Tome and Principe ²³⁴	Law 2/77 (Art. 89)

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143. Serbia ²³⁶	Constitution (Art. 28) Law on Family Relations (Art. 6, 75, 89, 100, and 266)
144. Seychelles ²³⁷	Children (Amendment) Act 2005 Children (Amendment) Act 1998
145. Sierra Leone ²³⁸	Child Rights Bill Draft National Children's Policy and Prevention of Cruelty to Children Act
146. Singapore ²³⁹	Children and Young Persons Act (Cap. 38) Women's Charter (Cap. 353) Adoption of Children Act (Cap. 4) Guardianship of Infants Act (Cap. 122) Child Care Centres Act (Cap. 37A) Criminal Procedure Code (Cap. 68) Evidence Act (Cap. 97) Penal Code (Cap. 224)
147. Slovakia ²⁴⁰	Civil Procedure Code (Art. 176-180) Family Act Social and Legal Protection of Children and Social Guardianship Act

²³⁴ CRC, Second to fourth periodic reports on the implementation of the Convention on the Rights of the Child due in 2008 Sao Tome and Principe (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/STP/2-4 para(s)89-93, 118 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSTP%2f2-4&Lang=en> accessed on 11 Feb 2014.

²³⁵ CRC, Second periodic reports of States parties due in 1999 Senegal (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/SEN/2 para(s)90, 114, 162, 182-185, 202 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSEN%2f2&Lang=en> accessed on 11 Oct 2014.

²³⁶ CRC, Initial report of States parties due in 2003 Serbia (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/SRB/1 67-79, 117, 175, 180, 230, 232-233 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSRB%2f1&Lang=en> accessed on 11 Feb 2014.

²³⁷ CRC, Second, Third and Fourth Periodic Reports of State Parties Due In 2007 Seychelles (Consideration Of Reports Submitted By States Parties Under Article 44 of The Convention, 2010) CRC/C/SYC/2-4, paragraph(s)15, 19, 60, 75-79, 110, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²³⁸ CRC, Second periodic report of States parties due in 1997 Sierra Leone, (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/SLE/2, paragraph(s)129-132 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²³⁹ CRC, Second and third periodic reports of States parties due in 2007 Singapore (Consideration of reports submitted by States parties under Article 44 of the Convention), CRC/C/SGP/2-3 paragraph(s)94-106 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁴⁰ CRC, Second periodic reports of States parties due in 1999 Slovakia (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/SVK/2 paragraph(s)113, 117, 125, 185-188, 205-207 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSVK%2f2&Lang=en> accessed on 11 Feb 2014.

	Civil Procedure Code Civil Code
148. Slovenia ²⁴¹	Act Amending the Marriage and Family Relations Act Act concerning the Pursuit of Foster Care Civil Procedure Act 1999 International Protection Act (Art. 16)
149. Solomon Islands ²⁴²	Juvenile Offenders Act (S. 9) Penal Code (S. 204, 225, and 226) Adoption Act Affiliation, Separation and Maintenance Acts
150. South Africa ²⁴³	Child Justice Act No. 75 Of 2008 (S. 9) Refugees Amendment Act No. 33 Of 2008 (Art. 1) Prevention and Combating Of Trafficking In Persons Act No. 7 Of 2013 (S.31) Domestic Violence Act No. 116 Of 1998 (S.7)
151. Spain ²⁴⁴	Act No. 15/2005 of 8 July Organic Law No. 1/1996 of 15 January (Art. 2) Act No. 8/2002 of 27 May (Art. 44)
152. Sri Lanka ²⁴⁵	Tsunami (Special Provisions) Act. Prevention of Domestic Violence Act
153. St. Kitts and Nevis ²⁴⁶	Guardianship of Infants Act Adoption Act
154. St. Lucia ²⁴⁷	Civil Code

²⁴¹ CRC, Third and fourth periodic reports of States parties due in 2008 Slovenia (Consideration of the reports submitted by States parties under Article 44 of the Convention) CRC/C/SVN/3-4, paragraph(s)100 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁴² CRC, Initial reports of States parties due in 1997 Addendum Solomon Islands (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/51/Add.6 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f51%2fAdd.6&Lang=en> accessed on 11 Feb 2014.

²⁴³ CRC, Initial reports of States parties due in 1997 Addendum South Africa (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/51/Add.2 paragraph(s)77, 102, 107, 118, 129, 292, 295, 296, 317, 338, 349, 462, 557 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f51%2fAdd.2&Lang=en> accessed on 11 Feb 2014.

²⁴⁴ CRC, Third and fourth periodic reports of States parties due in 2008 Spain, (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/ESP/3-4 p.ara 271-276 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fESP%2f3-4&Lang=en> accessed on 11 Feb 2014.

²⁴⁵ CRC, Third and fourth periodic report of States parties due in 2003 Sri Lanka (Consideration of reports submitted by States parties under Article 44 of the Convention) CRC/C/LKA/3-4, paragraph(s)78-81 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁴⁶ CRC, Initial reports of States parties due in 1992 Addendum St. Kitts And Nevis (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/3/Add.51 paragraph(s)8, 26, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f3%2fAdd.51&Lang=en> accessed on 11 Feb 2014.

155. St. Vincent and the Grenades ²⁴⁸	Law of Minors Act (S. 5) Matrimonial Causes Act (S. 64) Adoption Act (S.16) Domestic Violence (Summary Proceedings) Act, 1995 Juveniles Act
156. Sudan ²⁴⁹	The Child Act (Art.3)
157. Swaziland ²⁵⁰	Family Law Customary Law Child Care Service Order (1977) Prison Act (1964) (S. 28)
158. Sweden ²⁵¹	Social Services Act (2001:453) Education Act 2010 (Art. 10) The Aliens Act (2005:716) (S. 10) Act on Imprisonment (2010:610) Act on Detention (2010:611).
159. Switzerland ²⁵²	Swiss Civil Code (Art. 264, and 274)
160. Syrian Arab Republic ²⁵³	Social Insurance Act was amended by Decree No. 78 of 2001 (annex 30) Children's Rights Bill Maintenance and Social Solidarity Fund Bill Legislative Decree (Art. 10) Minister's Decision No. 819 of 19 July 1981 (Art. 2)

²⁴⁷ CRC, Combined second to fourth periodic reports of States parties due in 2010 Saint Lucia (Consideration of the reports submitted by States parties under article 44 of the Convention) CRC/C/LCA/2-4 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fLCA%2f2-4&Lang=en> accessed on 11 Feb 2014.

²⁴⁸ CRC, Initial reports of States parties due in 1995 Saint Vincent And The Grenadines (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/28/Add.18 paragraph(s)72-77, 166, 174, 212 and 213<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f28%2fAdd.18&Lang=en> accessed on 11 Feb 2014.

²⁴⁹ CRC, Third and fourth periodic reports of States parties due in 2007 Sudan, (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/SDN/3-4 paragraph(s)56-58<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGNB%2f2-4&Lang=en> accessed 7 Nov 2014.

²⁵⁰ CRC, Initial report of States parties due in 1997 Swaziland (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/Swz/1 paragraph(s)112-120, 151-169, 224-225, 234- 236, 278, 461, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSWZ%2f1&Lang=en> accessed on 11 Feb 2014

²⁵¹ CRC, Fifth periodic reports of States parties due in 2011 in Sweden, (Consideration of reports submitted by States parties under Article 44 of the Convention) CRC/C/SWE/5, paragraph(s)118-129 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSWE%2f5&Lang=en> accessed on 7 Nov 2014.

²⁵² CRC, Second, Third and fourth periodic reports of States parties due in 2007 in Switzerland, (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/CHE/2-4, paragraph(s)93-95<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSWE%2f5&Lang=en> accessed on 7 Nov 2014.

²⁵³ CRC, Third and fourth periodic reports of States parties due in 2009 Syrian Arab Republic (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/SYR/3-4 paragraph(s)68, 69, 160-166, 292<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSYR%2f3-4&Lang=en> accessed on 11 Feb 2014.

		Civil Code
		Commercial Code
161. Tajikistan ²⁵⁴		Constitution (Art. 10) Family Code (Art. 59)
162. Thailand ²⁵⁵		The Child and Youth Development Promotion Act of 2007
163. The Former Yugoslav Republic of Macedonia ²⁵⁶		The Constitution of the Republic of Macedonia The Child and Youth Development Promotion Act of 2007 Law on Family (Art. 123)
164. Timor-Leste ²⁵⁷		Draft Human Trafficking legislation (Art. 34) Basic Law of Education Draft Child's Code (Art. 3) Draft Educational Guardianship of Children's Law (Art.7)
165. Togo ²⁵⁸		July 2007 Children's Code (Art. 4-8)
166. Trinidad and Tobago ²⁵⁹		Adoption of Children Regulations (S. 7) Adoption of Children Act, No. 67 of 2000 (Art. 14) Children's Authority Act, No. 64 of 2000 (S. 22, 23, 24, 27 and 38) Family Law (Guardianship of Minors, and Domicile and Maintenance) Act, Chap. 46:08 (Art. 8)

²⁵⁴ CRC, Second periodic reports of States parties due in 2000 Tajikistan (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/TJK/2 paragraph(s)12, 109, 127-135, 223, 264, 299, 314, 516, 627, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTJK%2f2&Lang=en> accessed on 11 Feb 2014.

²⁵⁵ CRC, Combined third and fourth periodic reports of States parties due in 2009 Thailand (Consideration of the reports submitted by States parties under article 44 of the Convention) CRC/C/THA/3-4 paragraph(s)6, 45, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTHA%2f3-4&Lang=en> accessed on 11 Feb 2014.

²⁵⁶ CRC, Second periodic report of States parties due in 1998 The Former Yugoslav Republic of Macedonia (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/MKD/2 para(s)6, 7, 32-40, 103, 111-115, 138, 145-146, 433, 480, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMKD%2f2&Lang=en> accessed on 11 Feb 2014.

²⁵⁷ CRC, Combined second and third periodic reports of States parties due in 2013 Timor Leste (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/TLS/2-3 paragraph(s)56-60, 108, 263 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTLS%2f2-3&Lang=en> accessed on 11 Feb 2014.

²⁵⁸ CRC, Combined third and fourth periodic reports of States parties due in 2007 Togo (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/TGO/3-4 paragraph(s)64, 65, 86-91, 436, 47,8 479. 660 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTGO%2f3-4&Lang=en> accessed on 11 Feb 2014.

²⁵⁹ CRC, Second periodic reports of States parties due in 1999 Trinidad And Tobago (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/83/Add.12 paragraph(s)28, 371-378, 401, 402, 430, 431,436, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f83%2fAdd.12&Lang=en> accessed on 11 Feb 2014.

167. Tunisia ²⁶⁰	Act No. 2006-10 of 6 March 2006 Code of Personal Status Child Protection Code (Art. 11, 14, 16, 58, and 116)
168. Tanzania ²⁶¹	Law of the Child Act (2009) Spinsters and Single Parent Children Protection Act (2005), Education Act 1978 (Art. 59A) Law of Marriage Act (1971) Zanzibar Children's Act(S 9(3)) Law of Marriage Act (S. 125)
169. Turkey ²⁶²	Law on Child Protection.
170. Tuvalu ²⁶³	Custody of Children Act (1973) (S. 3) Matrimonial Proceedings Act (1984) The Adoption of Children Act (1985)
171. Turkmenistan ²⁶⁴	Constitution (Art. 27 and 37) Code of Criminal Procedure (Art. 82)
172. Uganda ²⁶⁵	Children Statute (S. 5)
173. Ukraine ²⁶⁶	Child Protection Act (Art. 4)
174. United Arab Emirates ²⁶⁷	Code of Civil Procedure Labour Relations Regulatory Act No. 8 of 1980

²⁶⁰ CRC, Third periodic report of the States Parties due in 2004 Tunisia (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/TUN/3 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTUN%2f3&Lang=en> accessed on 11 Feb 2014.

²⁶¹ CRC, Third to fifth periodic reports of States parties due in 2012 United Republic of Tanzania (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/TZA/3-5 paragraph(s)46-50 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁶² CRC, Combined second and third periodic reports of States parties due in 2007 Turkey (Consideration of the reports submitted by States parties under Article 44 of the Convention) CRC/C/TUR/2-3, paragraph(s)37 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁶³ CRC, Initial report of States parties due in 1997 Tuvalu (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/TUV/1 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTUV%2f1&Lang=en> accessed on 11 Feb 2014

²⁶⁴ CRC, Combined second to fourth periodic reports of States parties due in 2010 in Turkmenistan, (Consideration of reports submitted by States parties under Article 44 of the Convention) CRC/C/TKM/2-4, para(s)27-38 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014

²⁶⁵ CRC, Second periodic report of States parties due in 1997 Uganda (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/65/Add.33 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f65%2fAdd.33&Lang=en> accessed on 11 Feb 2014

²⁶⁶ CRC, Third and fourth periodic reports of States parties due in 2008 Ukraine (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/UKR/3-4 paragraph(s)36-38, 60 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fUKR%2f3-4&Lang=en> accessed on 11 Feb 2014

²⁶⁷ CRC, Initial Reports Of States Parties Due In 1999 United Arab Emirates, (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/78/Add. 2, p. 16, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

175. United Kingdom ²⁶⁸	Children Act 1989 (S. 46(10)) Minors Act (S.6) Children Law 2003 (S. 24(4)) Public Health (Day Nurseries and Nursery Schools) Regulations 1978
176. Uruguay ²⁶⁹	1934 Children's Code
177. Uzbekistan ²⁷⁰	Civil Code and Family Code
178. Venezuela (Bolivarian Republic of) ²⁷¹	Child and Adolescent Protection Act (Art. 7 and 26)
179. Vietnam ²⁷²	Law on Criminal Procedure 2003 Law on Child Protection, Care and Education 2014 (Art. 13) Government's Decree No. 36/2005/ND-CP in 2005 Law on Donation, Transplant of parts of Body and The Giving of Corpses in 2006 Government's Decree No. 69/2006/ ND-CP 2006.
180. Yemen ²⁷³	Children's Right Act No. 45 of 2002
181. Zambia ²⁷⁴	Employment of Young Persons and Children's Act (Art. 274) Apprenticeship Act (S. 9) Liquor Licensing Act(Chapter 167) Day Nurseries Act (Chapter 393)
182. Zimbabwe ²⁷⁵	Children's Act [Chapter 5:05] (Art. 9)

²⁶⁸ CRC, Initial reports of States parties due in 1996 United Kingdom, (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/41/Add.7, paragraph(s)111-114<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁶⁹ CRC, Second periodic reports of States parties due in 1997 Uruguay (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/URY/2 paragraph(s)64-71<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁷⁰ CRC, Third and fourth periodic reports of States parties due in 2010 Uzbekistan (Consideration of reports submitted by States parties under Article 44 of the Convention), CRC/C/UZB/3-4, paragraph(s)325, 335 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁷¹ CRC, Combined third to fifth periodic reports of the Bolivarian Republic of Venezuela (Consideration of reports submitted by States parties under article 44 of the Convention)CRC/C/VEN/3-5 paragraph(s)120-139, 166-167 < http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fVEN%2f3-5&Lang=en> accessed on 11 Oct 2014.

²⁷² CRC, Third and fourth periodic reports on the implementation of the Convention in the period 2002–2007 Viet Nam, (Consideration of reports submitted by States parties under article 44 of the Convention) CRC/C/VNM/3-4 , paragraph(s)89- 96 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov 2014.

²⁷³ CRC, Fourth periodic report of States parties due in 2008 Yemen (Consideration of reports submitted by States parties under Article 44 of the Convention) CRC/C/YEM/4, para(s)78-80 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en> accessed 7 Nov. 2014.

²⁷⁴ CRC, Initial reports of States parties due in 1994 Zambia (Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention) CRC/C/11/Add.25 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f11%2fAdd.25&Lang=en> accessed on 11 Oct 2014

Customary Law and Local
Courts Act [Chapter 7:05]. (S. 5)
Matrimonial Causes Act (S. 10)
Guardianship of Minors Act(S. 5)

²⁷⁵ CRC, Second Periodic Report Of The Republic Of Zimbabwe To The Committee On The Rights Of The Child paragraph(s)29 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fZWE%2f2&Lang=en > accessed on 11 Oct 2014.

CHAPTER 7

THE APPLICABILITY OF THE CUSTOMARY INTERNATIONAL LAW RULES FOR REFUGEES IN MALAYSIAN COURTS.

7.1 INTRODUCTION

Domestic courts as independent as they could be are still organs of the state, thus, their decision to apply customary international law (CIL) in courts is considered part of state practice in relation to international custom and it should bind parties to a litigation involving customary international law. The application of international law can be carried out by the judiciary through constitutional interpretation, development of the common law, judicial review of administrative decisions, judicial discretion and statutory interpretation. However, the applicability of customary international law in domestic courts is determined by the legal status of the rule within national legal framework.

The primary aim of this chapter is to determine whether the principle of *NR* and the BIC can be considered as ‘law’ according to Malaysian law and thus applicable in Malaysian courts. The answer to this question ascertains whether an individual child asylum seeker or refugee will be able to invoke his/ her rights which are protected under the principle of *NR* and the BIC before Malaysian courts. As shown in Chapters 5 and 6, there are enough evidence to convince that Malaysia is bound by the principle of *NR* and the principle of the BIC in refugee situation. But this is principally from the viewpoint of international law. What is left

to be determined now is on the question of the applicability of the two principles in Malaysian court. This chapter will deal entirely with the national perspective of international law.

Various issues are surrounding customary international law and its status within domestic norms in different jurisdictions. Different states have different approach in accepting customary international law into municipal law.¹ Thus, it is essential to identify Malaysia's attitude towards customary international law and the interaction between Malaysian legal system and the customary rules. This study believes that when states complies to the obligation under the principle of *NR* and the best interests of the child, refugee children in Malaysia will be able to enjoy their rights. In addition to that, this study also believes that in order to enforce the obligation, the role of the judiciary is similarly important. However, courts need to be convinced of the applicability of the two principles and that there is nothing that could legally inhibit the process.

The objective of this study is to analyse whether there is a prospect and possibility to invoke refugee children's rights and protection under the two principles in Malaysian courts. It therefore scrutinises the status of customary international law within Malaysian legal system

¹ As discussed for example in Peter Malanczuk, "International Law and Municipal Law" (Routledge London 1997) 63-71; Patrick Capps, "The Court as Gatekeeper: Customary International in English Courts" (2007) 70 (3) Modern Law Review 458- 483; E.A. Alkema, 'International Law in Domestic Systems' (2010) 14 (3) Electronic Journal of Comparative Law 2, <<http://www.ejcl.org>> accessed 5 July 2011 ; Hungdah Chiu and Chun- I Chen, "The Status of Customary International Law, Treaties, Agreements and Semi- Official or Unofficial Agreements in law of the Republic of China on Taiwan" (2007) 190 (3) Maryland Series in Contemporary Asian Studies; J.G. Collier, "Is International Law Really Part of the Law of England?" (1989) 38 (4) The International and Comparative Law Quarterly 924- 935; and V.G. Hegde, "Indian Courts and International Law" (2010) 23 (1) Leiden Journal of International Law 53-77.

and the application of the two customary principles in Malaysian courts to see whether the current legal setting and judicial attitude enable meaningful use of the rules. In doing so, this study first scrutinise the position of customary international law as a source of law within Malaysian legal system. This involves deliberation on the doctrine of transformation and doctrine of incorporation.² It will then look at whether an asylum seeker will have a *locus standi* to force the authority to comply with the principles of customary international law. Next it predicts the extent to which Malaysian courts are able to give effect to the rules of customary international law by looking at the reception and application of customary international law by Malaysian courts in a number of previous cases..

7.2 THE INCORPORATION AND TRANSFORMATION OF INTERNATIONAL LAW INTO MALAYSIAN LAW.

For any law to be applicable in the courts, the laws or the rules must be present in the form of written law; or otherwise in unwritten form; as far as it is permissible, and comes from a legitimate source of law according to the courts. From international law viewpoint, national courts must conform to international norms and therefore municipal courts should apply international law principles. Unfortunately, that is not how every state looks at it.

The way customary international law and international treaties are to be accepted into national legal system and thus applied by the courts are based on different doctrines depending on

² In J.G. Collier, "Is International Law Really Part of the Law of England?" (1989) 38 (4) *The International and Comparative Law Quarterly* 924, 924- 926 the author explain the common answer to the question of whether international is part of law in England which involves discussing the two prominent doctrines/theories.

states attitude towards international law or how state look at the relationship between national law and international law. Two doctrines are relevant in this regards: the doctrine of incorporation and the doctrine of transformation, in which the status of international law as opposed to national law determines how international law will be regarded as part of municipal law in a particular jurisdiction. These doctrines decide the interaction between national law and international law, whether they are to be treated as an integral part of the same system and thus has the same standing in domestic courts; or to be considered as two separate systems dealing with separate subjects.³

For the purpose of determining the applicability of customary international law in Malaysian courts, this chapter first deals with the question of how international treaties and convention entered into by the Malaysian government; and customary international law as unwritten rule can become a legitimate source of law in Malaysia, and then be given effect in local courts. It does not however discuss issues regarding the sources of Malaysian law in general.

7.2.1 Dualist State and the Doctrine of Incorporation

Malaysia has been practising a dualist approach towards international law and treaties⁴ and this is perhaps an influence of the British system as Malaysia was once a British colony and

³ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 131

⁴ Abdul Ghafur Hamid, *Judicial Application of International Law in Malaysia: A Critical Analysis in Asia Pacific Yearbook of International Humanitarian Law Vol 1* (Institute of International Legal Studies, Philippines 2005) 14-15.

its legal system is deeply influenced by the English legal system.⁵ In fact the common law of England is also a source of Malaysian law.⁶

The dualism theory maintains that international law and municipal law are two separate systems of rules without superiority effect over each other as both regulate different subject matter.⁷ However in practice, dualist states often make domestic rules that give subjugation effect to international law.⁸ This theory of distinction is in complete disagreement with the monism theory whose approach is to treat international law as supreme over national law.⁹ Monism considers both laws as a single unit with international law as the basic law¹⁰ and consequently international law will automatically become part of municipal law, be it in a form of treaty or unwritten such as customary international law.¹¹

Nevertheless, even though international and national law operate in different domain, there are occasions where both laws will compete against each other¹² which resulted in state having to apply the municipal law while at the same time is in breach of its international

⁵ See for instance Ahmad Ibrahim and Ahilemah Jones, "The Malaysian Legal System" (Dewan Bahasa dan Pustaka, Kuala Lumpur 1987); and Wu Min Aun, "The Malaysian Legal System" (Longman, Petaling Jaya 1999).

⁶ Civil Law Act 1956 (Act 67), section 3.

⁷ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 131.

⁸ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 139.

⁹ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 139.

¹⁰ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 132.

¹¹ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 139.

¹² An example of this situation is the problem of asylum where state is trying to enforce its own law on regulating the admission of immigrant without valid travel document and penalise them for immigration offence while the principle of *non-refoulement* prohibit states from rejecting a refugee and the CRSR prohibit state from taking criminal action against refugee.

obligation.¹³ Fitzmaurice concludes that in this situation the municipal law which is being upheld is not questioned but rather, it is the state liability for the failure to fulfil its obligation under international law.¹⁴ In dualist state, its municipal law cannot be invalidated by international law which is in conflict with its domestic provisions.¹⁵

7.2.2 International Law in the Federal Constitution

As a dualist state with a written constitution, the legal effect of international treaties and principles of international law in Malaysian law however, is not provided under the Malaysian Federal Constitution. In fact there is no clear status of international law in the federation or within its legal framework. The international law, as will be discussed in the coming sections, gains its domestic status through case laws.¹⁶ In relation to international law, the Constitution declares that the Constitution is the supreme law of the land and that any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistencies be void.¹⁷ Provision of Article 4 (1) refers to laws enacted by the Parliament

¹³ Rebecca M.M. Wallace and Olga Martin- Ortega, *International Law*(Sixth Edition, Sweet Maxwell, England, 2009) 39.

¹⁴ Gerald Fitzmaurice, “*The General Principles Of International Law Considered From The Standpoint Of The Rule Of Law*” 92 Hague Recueil 5.

¹⁵ Gerald Fitzmaurice, “*The General Principles Of International Law Considered From The Standpoint Of The Rule Of Law*” 92 Hague Recueil 5.

¹⁶ Abdul Ghafur Hamid , *Judicial Application of International Law in Malaysia: A Critical Analysis in Asia Pacific Yearbook of International Humanitarian Law Vol 1* (Institute of International Legal Studies, Philippines 2005) 14-15.

¹⁷ Malaysian Federal Constitution, Article 4 (1):

(1) *This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

(2) *The validity of any law shall not be questioned on the ground that –*

(a) *it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or*

(b) *it imposes such restrictions as are mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.*

(3) *The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or -*

and is silent regarding international law. This only indicates that where the Constitution is in conflict with other statutes, the Constitution shall prevail. The position of international law that is inconsistent with national laws or written law can be referred to in decided cases. This will be dealt with later at the coming section.

The Constitution only identifies specific powers of the federal legislature or the Parliament to make laws in respect of matters concerning Malaysia's relation with other countries and international organisation including the implementation of decisions taken during the participation in international bodies that are binding on the country. Article 74 of the Federal Constitution read as follows:

“(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List of the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).”

Federal List of the Ninth Schedule, Federal Constitution stated:

*“1. External affairs, including -
 (a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country;
 (b) Implementation of treaties, agreements and conventions with other countries;
 (c) Diplomatic, consular and trade representation;*

-
- (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;*
 - (b) if the law was made by Legislature of a State, in proceedings between the Federation and that State.*
 - (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Supreme Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.*

(d) International organizations; participation in international bodies and implementation of decisions taken thereat;...”

These provisions give an exclusive power for the Parliament to make laws in relation to treaties, agreements and conventions entered into by the executive including those under the umbrella of the United Nations and the power to implement the treaties, agreements and conventions in enabling them to take effect in the country. As for the position of the executive authority to enter into international treaties, agreements and conventions on behalf of the federation, it is clearly stipulated under Article 80 (1) of the Federal Constitution that: “the executive authority of the Federation extends to all matters with respect to which Parliament may make laws”. The effect would be that the executive organ of the Federation or the government is empowered to administer and to implement matters, which fall under the authority of the Parliament.

The other effect of Article 74 (1) read together with the Federal List of the Ninth Schedule would be the requirement for the Parliament to incorporate provisions of treaties, agreements and conventions into written legislation before it can be applied in Malaysian courts. As such, in Malaysia, international treaties rely on national legislation as a special vehicle to transform them into municipal law because under Malaysian legal system, international law and municipal law are considered as two separate legal order and ratified treaties do not automatically become part of domestic law of the land. They need to be expressly enacted by Parliament to become effective.

So far, a number of Parliamentary statutes have been enacted to give effect to international treaties to which Malaysia is a party and this includes the Geneva Conventions Act 1962 (Act 512) (Revised 1993) which adopted provisions of the four Geneva Conventions for the Protection of the Victims of War or 1949; the Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636) (Revised 2004) that gives legal effect to the Vienna Convention on Diplomatic Relations 1961; and the International Organisations (Privileges and Immunities) Act 1992 (Act 485) that gives legal effect to the Convention on the Privileges and Immunities of the United Nations 1946.

Nevertheless, it is crucial to point out that Malaysia is also a state party to many other treaties but have not yet fulfilled the obligation to implement them domestically, in other words, these ratified treaties are not given full legal effect. Instead, the approach taken is that selected provisions of the treaties are consolidated and incorporated into Malaysian laws. The United Nations Convention on the Rights of the Child (CRC) is one of them. Some of the principles of the CRC are enshrined in the provisions of the Child Act 2001 but many other provisions including the most important stipulations including pertaining to refugee children are still inoperative and are yet to be given legal effect.

7.2.3 The Adoption and Reception of Customary International Law In Malaysia Without Explicit Provisions.

7.2.3.1 Statutory Authority for the Adoption and Reception of CIL.

The remaining issue to be considered in relation to the status of international law in Malaysia would be the application of customary international law as unwritten law that requires no state consent and ratification. Domestic application of customary international law rule relates to the question of how the rule can be applied in regulating the relation between states and between individuals and states. Individual will be able to derive the right not to be returned under the *NR* principle but can he convince the court to enforce his rights? Can a refugee child apply to the court on the basis that his/ her best interests is not made a primary consideration in deciding durable solution for him/ her?¹⁸ Questions on how exactly customary international law can be applied in Malaysian courts and the extent of its legality as a source of law in the country have not sufficiently addressed both academically and judicially.¹⁹

From the international law point of view, as discussed above, Malaysia is bound by the customary international law rules but from the domestic perspective, the status of such rule is unclear. and cannot be ascertained. In the absence of a statutory authority for the application of customary international law, it is doubtful that courts will ever recognise the rules or

¹⁸ In the case of *C v. Director of Immigration* [2008] HKCU 256 the Court of Appeal recognised the right of refugees under customary norm of *non-refoulement* and this provide a *locus standi* for the refugee to claim their rights in the courts.

¹⁹ Very limited journal articles and case laws discussed this matters including HL Dickstein, "The Internal Application of International Law in Malaysia: The Model of the relationship between international and municipal law" JMCL, 204- 215.

consistently accepting the rule. It must be noted however, that failure to recognise and to apply a legally recognised customary international law in domestic courts on the ground that the said rule is not given effect by any written law is indeed a violation of international law.²⁰

7.2.3.2 Customary International Law as Part of Common Law

To begin with, it is suggested that customary international law is applicable in Malaysia if it is regarded as part and parcel of the common law.²¹ The Civil Law Act 1956 (Revised 1972) Section 3 (1) provides that:

“ Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph(3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.”

²⁰ Rebecca M.M. Wallace and Olga Martin- Ortega, *International Law*(Sixth Edition, Sweet Maxwell, England, 2009) 39.

²¹ HL Dickstein, “The Internal Application of International Law in Malaysia: The Model of the relationship between international and municipal law” JMCL, 204, 204.

The provision requires local courts to apply common law and the law of equity as administered in England on the 7 April 1956 (for Peninsular Malaysia); 1 December 1951 (for Sabah); and 12 December 1949 (in the case of Sarawak). Other than common law, statutes of general application are also applicable in Sabah and Sarawak²² provided that they are not in contrary to other domestic legislation.²³ Reliance on this provision is made because it has been argued and confirmed in many English cases that the customary international law form parts of English common law and thus, customary international law could also be applied in Malaysia for the same reason subject to other condition that will be discussed below. This part will deal with case laws from England and Malaysia to demonstrate how the courts come to the conclusion that customary international law is part of domestic law or to reject its application for any reasons.

7.2.4 English Cases

A number of relevant English cases will be discussed here to explain the position of customary international law within the framework of English legal system. In *Buvot v Barbuit* (1737) Cas. Temp. Talbot 281, Lord Talbot declares the court's recognition of international law as law in England by stating as follows: 'the law of nations in its full extent was part of the law of England'. Later in *Triquet v Bath* (1764) 3 Burr 1478, Lord Mansfield quoted and agreed with the earlier declaration made by Lord Talbot in *Buvot v Barbuit*.²⁴

²² Sabah and Sarawak are two states in which form the East Malaysia. It is separated from West Malaysia by the South China Sea. See the **Figure 1** Map of Malaysia

²³ Civil Law Act 1956 (Revised 1972) Section 3 (1) (b) (c).

²⁴ Malcom N. Shaw, *International Law* (Cambridge University Press, Cambridge 2008) 141; and D J Harris, *Cases and Materials on International Law* (Fifth Edition, Sweet Maxwell, London 1998) 74.

In a Privy Council case, *Chung Chi Cheung v R* [1939] AC 160,²⁵ Lord Atkin when considering a complicated issue on jurisdiction of the courts in relation to a ship at sea where a crime took place stated to the effect:

“It must be always remembered that so far at any rate as the Courts of this country are concerned international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. **There is no external power that imposes its rules upon our own code of substantive law or procedure.** The court acknowledges the existence of a body of rules, which nations accept amongst themselves. On any judicial issue, they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”²⁶

In the above case Lord Atkin asserts that the courts will only apply international law which have been expressly accepted by English law and as for customary international law, it will be valid if it is consistent with written law and previous decisions of the courts.

Another two leading cases; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356 and *Maclaine Watson v Department of Trade and Industry* [1988] 3 WLR 1033

²⁵ Reported in the Malayan Law Journal as *Chung Chi Cheung v The King* [1939] 1 MLJ 1.

²⁶ Cases such as *R v Keyn* (1876) 2 Ex D 63; *West Rand Gold Mining Co* [1905] 2 KB 391; and *Mortensen v Peters* (1906) 8 F(J) 93, also contain debates on the application of customary international law in English courts.

confirmed and reaffirmed the employment of the doctrine of incorporation as the correct approach in deciding the acceptance of customary international law rules into English law.

The above English cases demonstrate that customary international law is considered part of the English Law. Its application in England is firmly founded on the doctrine of incorporation in which the rules are accepted and recognised by the courts provided that they are not in conflict with any statute of the Parliament or decisions of the highest court. Nonetheless, the application is limited by the rule that the court shall not take the role of the Parliament to create criminal sanctions. The House of Lords in *R v Jones and Others*,²⁷ held that while agreeing with the contention that customary international law is a source of law in England of Wales without the need for any domestic legislation or precedent, the court refused to acknowledge that any crime recognised as customary international law can be assimilated automatically into domestic legal framework. It is the duty of the Parliament to pass a suitable statute to determine a criminal conduct.

The judgement in *Kneller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*²⁸ stated that the only source of criminal offences is the statute, thus the court has no power to create new criminal offences. It was also held in *R v Jones and Others* that the courts has no power to regulate the way prerogative powers are exercised by the executive and if the court is to make the crime of aggression under the customary international law as a

²⁷ [2006] UKHL 16, [2006] 2 All ER 741.

²⁸ [1973] AC 435, [1972] 56 Cr App R 633

crime within the English law, that will amount to putting the executive policy under the supervision of the judiciary. *Chandler v DPP*²⁹ established that a judicial review of the exercise of the prerogative cannot be allowed.

7.2.5 Malaysian Cases

Moving on to Malaysian context, the status of customary international law as a component of English law could be viewed as part of the common law which is applicable in the country under Section 3 (1) of the Civil Law Act 1956 as far as the rules are not in conflict with Malaysian law, public policy and local circumstances.³⁰ Even though customary international law is said to have a place in the common law sphere, its application in Malaysian courts still cast doubt over the actual relationship and the interaction between customary international law and Malaysian legal system. Issues on the application of customary international law in domestic courts have a very limited judicial consideration. Only a handful of case laws are already being considered as will be discussed below.

In considering whether a customary international law can be applied if it is contrary to domestic laws or whether which law shall prevail when there is conflict between provisions of the statute and international law (including customary international law), reference must be made to the case of *PP v Wah Ah Jee*³¹ in which the court stated that it is the courts' duty to take the law as it is or as they find it. Whether a written law is contrary to international law

²⁹ [1964] AC 763

³⁰ Abdul Ghafur Hamid @ Khin Maung Sein, "Judicial Application of International law in Malaysia: A Critical Analysis" (2005) 1 Asia Pacific Yearbook of International Humanitarian Law 196- 214, 201.

³¹ (1919) 2 F.M.S.L.R. 193

should not be taken into account. This means that a written law may contradict international law and shall prevail over it.

In the case of *Olofsen v Govt. Of Malaysia*,³² the Singapore High Court applied a customary rule of state sovereignty. However, it was not disclose how did the rule is accepted into domestic legal framework. The Privy Council in *PP v Oei Hee Koi*³³ held that the customary international law as stated in the Oppenheim's International Law applied to the accused. It was also held that provisions of the Geneva Convention have not abrogated the customary international law rule. Again, in this case, the extent to which customary international law shall be applied in Malaysia was not explained.

In spite of the positive application of customary international law in the earlier cases, the court in *PP v Narogne Sookpavit*³⁴ convicted the accused for an offence punishable under section 11(1) of the Fisheries Act 1963 (Revised 1979) after being found to have in possession fishing appliances in Malaysian territorial waters without license. The court refused to accept the defence council's argument that 'the right to innocent passage' has become customary international law and thus, is part of Malaysian law and therefore, the respondents should be able to enjoy the right of innocent passage.

³² [1966] 2 MLJ 300

³³ [1968] 1 MLJ 148.

³⁴ [1987] 2 MLJ 100.

It was argued by the defence counsel that the accused are in Malaysian waters heading for Singapore and they had no other alternative but to get through Malaysian waters (claiming that this is a necessity) and thus, have the right of innocent passage.³⁵

However, the learned judge directs himself to the existence of the Traffic Separation Scheme that impliedly suggests that smaller boats such as the one in this case should keep away from the outer periphery of the sealane to avoid larger vessels. He also referred to Brownlie's commentaries in the 'Principles of Public International Law 3rd Edition (1979) 204 that explains the meaning of innocent passage based on Article 14 of the Convention of the Territorial Sea that stated :

"4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea."

Article 19 of the Draft Informal Composite Negotiating Text of 1977 that he also refers to, gives the meaning of innocent passage as follow:

"1. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. Such passage shall take place in conformity with the present Convention and with other rules of the international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state, if in the territorial sea it engages in any of the following

³⁵ *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 101.

activities:—

(i) any fishing activities;"

Furthermore, the court, according to Shanker J is obliged to consider evidence that a particular custom really exist before endorsing its existence. This is a requirement under section 13 and 14 of the Evidence Act 1950.³⁶ As the law referred to are considered ‘foreign law’, expert evidence is also required under section 45 of the same Act. Failure of providing the evidence of custom and the adoption of the international law into Malaysian law have compelled the court to hold that there was no innocent passage on the part of the accused, or the preciselimit of the right, and further held that the right to innocent passage as a customary international law is not proved.³⁷

³⁶ Section 13.

Where the question is as to the existence of any right or custom the following facts are relevant:

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence;
- (b) particular instances in which the right or custom was claimed, recognized or exercised or in which its exercise was disputed, asserted or departed from.

ILLUSTRATIONS

The question is whether A has a right to a fishery. A document conferring the fishery on A's ancestors, a pledge of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the pledge, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Section 14.

Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question.

Explanation 2—But where upon the trial of a person accused of an offence the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of that person shall also be relevant fact.

³⁷ *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 105.

Shanker J further held that even if it can be proved that an innocent passage is indeed a right, it cannot be applied and upheld as it is contrary to Malaysian statute particularly Regulation 3(b) of the Fisheries (Maritime) Regulations 1967. The judgement in this case is an example where the court is capable of rejecting the validity and the existence of a customary rule by citing the existence of a written law that is contrary to the customary rule. By making the act above as an offence, the Fisheries Act 1963 put an obstacle to the application of the customary rule in domestic courts.

The above case also brings to our attention the fact that the Evidence Act 1950 plays an important role in establishing the position of customary international law as a valid source of law in Malaysian courts. Not only that the party which tries to invoke a custom must provide proof that such custom exist, the Act also imposed a requirement that an expert opinion should be sought to prove foreign law (in this case, the customary international law).³⁸ This case confirmed that international treaties must be adopted by a statute to make it applicable in courts and as for custom, it requires expert evidence for proof. Most importantly, it also declares the supremacy of domestic laws over customary international law and this is consistent with the decision in the case of *PP v Wah Ah Jee*.³⁹

³⁸ Evidence Act 1950, Section 45.

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

³⁹ (1919) 2 F.M.S.L.R. 193.

After *Narogne*, the case of *Village Holdings Sdn. Bhd. v Her Majesty The Queen in Right of Canada*⁴⁰ casts a different picture. In contrast to the earlier case, Shanker J in this case held that Malaysia by virtue of section 3 of the Civil Law Act 1956, Malaysia is bound by the doctrine of absolute state immunity a common law Of England. He said:

“So far as a foreign sovereign is concerned, I hold that section 3 of our Civil Law Act 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity when it comes to the question of impleading a foreign sovereign who declines to submit.”

The court also refers to the fact that “the common law of England as administered in England on April 7, 1956 was that the immunity from legal process accorded to a foreign sovereign was absolute”.⁴¹ The case of *Mighell v Sultan of Johore* [1894] 1 QB 149 and *Duff Development Company Limited v Kelantan Government & Anor* [1924] AC 797 are also illustrative of the courts stand that of its lack of jurisdiction over foreign sovereign.

The court’s recognition of the sovereign immunity principle as common law in *Village* according to Hamid “clearly demonstrates the fact that the learned judge relied on English common law position which was declaratory of customary international law principle of absolute immunity”.⁴² Hamid’s inference is made on the basis that the rule of sovereign immunity is considered part of common law by the courts in England, thus, since the rule is

⁴⁰ [1988] 2 MLJ 656.

⁴¹ *Village Holdings Sdn. Bhd. v Her Majesty The Queen in Right of Canada* [1988] 2 MLJ 656, 662

⁴² Abdul Ghafur Hamid, Judicial Application of International Law in Malaysia: A Critical Analysis, in Asia Pacific Yearbook of International Humanitarian Law Vol 1 (Institute of International Legal Studies, Philippines 2005) 9.

also a recognized as customary international law it impliedly points out that when Malaysian courts accept it as common it also means the acceptance of the rule as customary rule by the Malaysian courts.

This inference however, must be treated with caution. It is clear in the case that the when recognizing the applicability of the rule in Malaysia, the court only refers to the common law status of the sovereign immunity and not its customary status. Nothing in the judgement could have impliedly point out that England applies the rule because it is a customary international law and thus Malaysia in accepting the rule as a common law also accept it on the basis of its customary status.⁴³

Even if the inference is correct, the court's decision shows that the acceptance of common law is still subject to confirmation that it is a common law of England that is being administered as at April 7, 1956 since at that time, the common law of England on sovereign immunity has changed and developed to restrictive immunity as in the case of *Trendtex*.⁴⁴ This is the position if the provision of Section 3 of the Civil Law Act 1956 is to be strictly applied. It means that any developments in the common law of England after the cut off sate of April 7, 1956 cannot be applied in Malaysia. In this situation, the legislature is the proper forum to

⁴³ This opinion is based on Chemerensky's commentary which stated that the doctrine of sovereign immunity as practiced in the United States is '...based on a common law principle borrowed from the English common law'. Erwin Chemerensky, 'Against Sovereign Immunity' (2001) 53 Stanford Law Review 1202, 1202. However, this study is also aware that there are many commentaries addressing the customary status of the principle.

⁴⁴ *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356

update the development of the common law by enacting new laws.⁴⁵

Nevertheless, the real situation in Malaysia is somewhat different than the theoretical understanding of Section 3 of the Civil Law Act 1956. The restrictions is ignored in some instances and observed at other times. For example, in the case of *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98, in Gopal Sri Ram JCA asserts that after 1956, the judiciary are at liberty to shape the way the common law of England are to be applied in Malaysian courts.⁴⁶ Thus, he chose to apply the English doctrine of unconscionable bargain developed in England after 1956 through Section 3 of the Civil Law Act.

On the contrary, the case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 3 MLJ 389, was treated differently. Abdul Hamid Muhammad FCJ in dealing with the question whether common law developed after 1956 should be followed states that:

“[30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether “local circumstances” and “local inhabitants” permit its application, as such. If it is “permissible” the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is “permissible”, with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia’s own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries.”

⁴⁵ Sharifah Suhanah Syed Ahmad, Introduction to the Sources of Law in Malaysia (2012) Foreign Law Research Globalex < http://www.nyulawglobal.org/globalex/Sources_Law_Malaysia.htm> accessed 3 May 2013.

⁴⁶ *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98, 115.

Abdul Hamid Muhammad FCJ is of the view that Malaysian courts can choose to apply the common law of England developed after 1956 if no common law before that date is found for a specific matter. He also acknowledges that the application of the common has sometimes failed to follow the correct approach as provided by the Civil Law Act 1956. He further asserts that:

“ [31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rationale of Malaysian courts applying “archaic” common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision.”

In the above case the Federal Court applies “...the old common law authorities which limited the claim for pure economic loss in cases of negligence, in particular severely limiting such claims against a local authority”.⁴⁷ Going back to the doctrine of absolute state immunity, its application is also reviewed by the Supreme Court in *Commonwealth of Australia v Miford (Malaysian) Sdn Bhd.*⁴⁸ Gunn Chit Tuan SCJ in answering whether absolute state immunity applies in this case stated as follows:

‘Section 3 of the Civil Law Act 1956 only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as

⁴⁷ Sharifah Suhanah Syed Ahmad, Introduction to the Sources of Law in Malaysia (2012) Foreign Law Research Globalex < http://www.nyulawglobal.org/globalex/Sources_Law_Malaysia.htm> accessed 3 May 2013.

⁴⁸ [1990] 1 CLJ 878, [1990] 1 MLJ 475.

applied in this country must remain static and do not develop. We have not been referred to any cases decided by the former Court of Appeal or the Federal Court after 7 April 1956, on the subject of sovereign immunity nor have we discovered any such cases decided after that date. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as The 'Parlement Belge' (1880) 5 PD 197. That is, at that time a foreign sovereign could not be sued in personam in our courts. But when the judgment in The 'Philippine Admiral' [1977] AC 373 was delivered by the Privy Council in November 1975, it was binding authority in so far as our courts are concerned. Therefore, by that time the common law position on sovereign immunity in this country would be that the absolute theory applied to all actions in personam but the restrictive view applied to actions in rem. When the Trendtex case [1977] 2 WLR 356, [1977] 1 All ER 881 was decided by the UK Court of Appeal in 1977, it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision and rule that under the common law in this country, the doctrine of restrictive immunity should also apply. That is more so in view of the very strong persuasive authority in The 'I Congreso' case [1983] 1 AC 244 in which the House of Lords had in July 1981, unanimously held that the restrictive doctrine applied at common law in respect of actions over trading vessels regardless of whether the actions were in rem or in personam. We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.⁴⁹ [Emphasis added]

The judgement in the present case only admits the applicability of the restrictive immunity rule through English common law that developed after 1956 as reflected in the case of *Philippine Admiral*,⁵⁰ *Trendtex*⁵¹ and *The 'I Congreso' case*.⁵² The court again, is silent of the status of the immunity rule as customary international law. It is more concern with the question of whether or not the rule has been made part of common law of England. *Midford* is the first case on sovereign immunity that ever reached the Supreme Court (which is now the Federal Court) in Malaysia, and it is binding on other courts of lower hierarchy.

⁴⁹ *Commonwealth of Australia v Midford (Malaysian) Sdn Bhd* [1990] 1 MLJ 475, 480.

⁵⁰ (1977) AC 373.

⁵¹ (1977) 2 WLR 356.

⁵² 1983) 1 AC 244.

Apart from that, the court further asserts a few important principles in relation to the application of common law in Malaysia: first, the court is at liberty to adopt the approach of applying common law rule that suits the legal needs of the country; and second, the Parliament has the power to enact a legislation which may be inconsistent with common law and thus, will have effect on the applicability of that rule. Thus, this study is of the view that when a particular customary rule is accepted as common law, its applicability in Malaysian courts is also subject to the rules that affect the applicability of common law.

7.3 ANALYSIS OF PRINCIPLES GOVERNING THE APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN MALAYSIAN COURTS

Local cases referred above in the determination of the applicability of customary international law in Malaysia, displayed that the first, there were not enough clarification and second, that there are inconsistencies in the part of court's attitude regarding the onus of proof of this matter. In one hand, the court insisted that the defence made insufficient effort to prove that a particular customary rule exists.⁵³ On the other hand, there are instance where the court take extra mile to show that a customary rule in question is a recognised rule in international law and thus applicable in local disputes such as in *Olofsen*. The court also relies on certificates issued by international organisation regarding some content of international rule.⁵⁴

The inconsistencies in the court's acceptance of the principles of customary international law are drawn from evidence adduced to the courts. The court refused to apply customary law in

⁵³ See *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 105..

⁵⁴ As shown in *Olofsen* and *Param*..

PP v Narogne Sookpavit for two reasons : first, because it was not convinced that the rule exist and second, even if the rule exist, there is written law that prohibit the applicability of the principle. Though the evidence and argument brought up by the defence council may not be strong enough, the right to innocent passage is already an established principle under customary international law.

It is not flattering that the judge in that case had failed to recognise the right to innocent passage as opposed to the finding in *Village Holdings Sdn. Bhd. v Her Majesty The Queen in Right of Canada* and *Commonwealth of Australia v Midford (Malaysian) Sdn Bhd* (if we were to follow Hamid's argument) where the court agree to apply customary international law via common law. Here, the courts are convinced with the existence of the rule of absolute sovereign immunity. The principle of sovereign immunity has been discussed in many cases as compared to the right of innocent passage and thus, more case laws can be referred to by the courts. When there is enough evidence to conclude that such rule exist and there is no other law that prevails to prohibit the application, the court are ready to apply the rule. It is also shown that the court relies on the submission of the party who insist that the customary rule exist to prove it and will easily accept the existence or a rule that has been firmly established.⁵⁵

Deliberations made on the Malaysian cases above give rise to three main principles in the application of customary international law in its domestic courts:

⁵⁵ (1988) 2 MLJ 656, 661-663.

7.3.1. The Rule Can Be Applied If It Can Be Considered As Common law.

The rules of customary international law can be applied in court as part of common law. The rules are accepted into Malaysian legal system by way of section 3 of the Civil Law Act 1956 that enable the application of the common law of England as administered at April 7, 1956. As shown in the *Village and Midford*, the most important consideration is the position of the certain rule as common law and not its customary status. Even though the Civil Law Act 1956 provides the cut-off date, it does not deter the Malaysian courts from going beyond the date by referring to the proviso that allows the court to take into consideration the local circumstances and needs. The courts' decision in *Midford*, and *Saad Marwi*,⁵⁶ highlight the courts' discretion on whether or not to follow the development of common law after 1956.

7.3.2. Not Inconsistent With Any Written Law

Through common law, the rule can be applied in Malaysia, only when it is not contrary to any written law or decision of the court of final order.⁵⁷ Thus, a customary rule that is acknowledged to exist and becomes part of common law may not be applied in Malaysia if any statutes operate to give it an adverse effect. The legislature has the power to make laws that are inconsistent with the common law or the customary international law and the written domestic law will prevail. However, it is unclear whether a specific rule in domestic law can impede the applicability of a general customary rule as a whole.

⁵⁶ *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98.

⁵⁷ *PP v Narogne Sookpavit* [1987] 2 MLJ 100, 105.

7.3.3. Duty to Prove a Custom Lies with the Party who wants to invoke it

The duty to prove that a particular rule of customary international law exists lies with the party who claim reliance on the customary international law. The party needs to show that such rule is recognised as customary within the international law framework. Court's ruling in *Narogne Sookpavit* is a clear example of such approach. Furthermore, it must be proved that the customary law is indeed part of common law of England. Nevertheless, the extent to which a custom must be proved in court is also uncertain. The courts is not bound to refer to the decisions of the International Court of Justice to guide it in the determination of the existence of a customary rule though this is being practiced in many other states such as Australia,⁵⁸ United Kingdom,⁵⁹ America,⁶⁰ and India.⁶¹

It is interesting to note that apart from the consideration above, other factors could also influence court's acceptance of customary international law. In a critical commentary, Benvenisti argues that there are other factors that prohibit the application of international law in local courts other than mere inconsistency or incompatibility of international law and domestic law. One of the factors is that judges are protecting governmental interests and international policies so that they will not interfere with policies already in place and to avoid upsetting the government's interests.⁶² However, further investigation on this issue should be

⁵⁸ See for instance discussion in Henry Burmester, "The Determination of Customary International Law in Australian Courts" (2004) 4 Non- State Actors and International Law 39- 47.

⁵⁹ Peter Rowe, "The Effect On National Law Of The Customary International Humanitarian Law Study" (2006) *Journal of Conflict & Security Law* 11 (2) 165-177.

⁶⁰ Karen Knop, Ralf Michaels, and Annelise Riles, International Law In Domestic Courts: A Conflict Of Laws Approach (2009). *Cornell Law Faculty Working Papers*. Paper 69. http://scholarship.law.cornell.edu/clsops_papers/69

⁶¹ V.G. Hedge, "Indian Courts and International Law" (2010) 23 (1) L.J.I.L 53-77.

⁶² Eyed Benvenisti, Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts 4 EJIL (1993) 159, 161.

conducted in a separate study, as it requires more time and space. Nevertheless, it is quite clear that the first principle above: customary international law form part of common law and hence, can be applied in the country by invoking section 3 of the Civil Law Act 1956. There is strong ground to conclude that the theoretical requirement in claiming that customary international law as part of Malaysian law has been fulfilled. However, Malaysian cases thus far only portray limited questions on the application of customary rules.

7.4 THE APPLICATION OF THE PRINCIPLE OF *NR*

This part looks at two important issues, the position on *non-refoulement* as common law and the consistency of the principle with Malaysian Law.

7.4.1 Customary Rule of *NR* as Common Law of England?

To prove that the principle is a common law, we have to look at the practice of English Courts in relation to *non- return*. There is a need to find cases where the protection against return is based on common law. Close examination of the case laws in England does not reveal any application of the principle of non- return or *NR* based on common law. In discussing the rights and protection of refugee, reference is always made to the CRSR and UK's obligation under it as a contracting state. The UK signed the CRSR on 28 July 1951 and ratified it on 11 March 1954. As a signatory to the CRSR, its regulation regarding asylum in the Asylum and Immigration Appeals Act 1993 incorporates provisions of CRSR.⁶³ UK is also a party to the European Convention on Human Rights (ECHR) and its provisions are adopted into the Human Rights Act 1998 and the protection against return or *NR* is provided under Article 3 of

⁶³ Inna Nazarova, 'Alienating "Human" From "Right": U.S. And UK Non-Compliance With Asylum Obligations Under International Human Rights Law' (2002) 25 Fordham Int'l L.J. 1335, 1340.

the Human Rights Act 1998. Without evidence supporting the position of *non-refoulement* as a common law, the rule cannot be applied in Malaysia via common law route.

7.4.2 What if there is a *lacuna*?

Even if the principle cannot be proved to be a common law, will it be possible to refer to the written law of England that deals with refugee matters? It is important to bear in mind that the qualification for the application of the common law, equity and statutes of general application is subject to absence of local law, the different cut-off dates, and local circumstances. These conditions should be applied in its entirety. The Supreme Court in the case of *Attorney General, Malaysia v Manjeet Singh Dhillon*⁶⁴ applied the common law on contempt of court when it is clear that there is no domestic legislation that deals with the subject matter and this was followed in the case of *Murray Hiebert v Chandra Sri Ram*.⁶⁵ The position of contempt of court under the common law as decided in the case of *R v Gray*⁶⁶ was used to explain what amount to contempt of court in Malaysia. In addition, if a common law rule is no longer in effect due to the enactment of a statute in England, the court is of the view that it no longer applicable in Malaysia. A decision in *Leong Bee v Ling Nam Rubber Works*⁶⁷ that declares a common law principle to be inapplicable in Malaysia since it has been replaced by a statute was followed by the High Court in *Lembaga Kemajuan Tanah Persekutuan v Tenaga Nasional*.⁶⁸ Any development after the cut-off dates is not binding and should be treated as

⁶⁴ [1991] 1 MLJ 167, 174.

⁶⁵ [1999] 4 AMR 4005, 4024.

⁶⁶ [1900] 2 QB 36

⁶⁷ [1970] 2 MLJ 45

⁶⁸ [1997] 2 MLJ 783.

persuasive as decided by the Privy Council in *Jamil Bin Harun V Yang Kamsiah & Anor*.⁶⁹ However, in a more recent case Abdul Hamid Muhammad FCJ in the case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* (2006) is of the view that it should be followed as it is left to the discretion of the court.⁷⁰

In the case of *Chan Ah Moi v Phang Wai Ann*,⁷¹ the High Court, relying on the provision of Section 3, Civil law Act 1956, allows the application to exclude the husband from a matrimonial home based on the British Domestic Violence and Matrimonial Proceedings Act 1976 since no provisions dealing with such application is provided in any written law in Malaysia.⁷² However, James Foong J of the High Court in the case of *Jayakumari v Suriya Narayanan*⁷³ stated that the case of *Chan Ah Moi* was wrongly decided⁷⁴ as it relies on the written law when it is not provided under the Civil Law Act 1956. In other words, the written law should not bind Malaysia. He insists that the cut-off date should be complied with regardless of the absence of law. In deciding the case before him, he relies on several other English cases not referred to by the earlier case. He creatively relied on common law cases for similar situation that is not provided for in Malaysian law.⁷⁵ It must be noted that he is of the opinion that there is no *lacuna* in the matter discussed in *Chan Ah Moi* as he managed to find and refer to a common law case to support his decision.

⁶⁹ [1984] 1 MLJ 217.

⁷⁰ Further discussion at 7.2.5.

⁷¹ [1995] 3 CLJ 846

⁷² *Chan Ah Moi v Phang Wai Ann* [1995] 3 CLJ 846, 850.

⁷³ [1996] 1 LNS 74.

⁷⁴ *Chan Ah Moi v Phang Wai Ann* [1995] 3 CLJ 846, 848.

⁷⁵ *Jayakumari v Suriya Narayanan* [1996] 1 LNS 74, 76-80.

There is no concrete evidence to support the reference to written law of England except for statute of general application in Sabah and Sarawak. Nevertheless, it is possible for the court to make his own decision by referring to the persuasive authority in England. Thus, it is still open for the court to be influenced by the written law of England to some extent and if there is a *lacuna*, a situation of injustice may be avoided. Even though it was found that the case of *Chan Ah Moi* was wrongly decided because there is indeed common law rules to be applied, in a situation where a *lacuna* exist, the last resort would be to refer to the written law provided that there is no any other domestic legislation providing inconsistent provisions but this question is yet to be tested in the Malaysian court. The effect of this would be for instance, even if the protection of *NR* is provided under the law in England, it cannot have any persuasive effect or to be applied in Malaysia in the situation refugee because of the conflicting provision in the Immigration Act 1959/1963.

7.4.3 The Inconsistency of the Principle of *NR* with Malaysian Law.

From international law perspective, state parties are responsible to ensure that its municipal laws are not contrary to its obligation under international law. By implementing international law into domestic laws, states will be able to harmonise between the two legal orders. The principle of customary international law accepted as common law in Malaysia is applicable provided that they are not inconsistent with any written law (statutes or Acts of Parliament) or decisions of the highest court. This is also the practice of many other states. What is not firmly established is the extent to which such inconsistency should takes effect or how much inconsistency is required before a principle of customary international law can be found void and thus inapplicable in Malaysian courts. Is it right to say that any degree of inconsistency

may render the principle invalid? What is the value of an exemption clause of a legal provision in the depreciation or removal of the inconsistency?

In discussing the position of the *NR* and the BIC principle in domestic court below, this study will discuss the nature of inconsistency character that could have effect on the applicability of customary international law. It intends to show that a rule of customary international will not simply becomes invalid or inapplicable in the courts for being slightly or partially inconsistent. It argues that state cannot simply escape its responsibilities under customary international law by relying on the effect of inconsistent provision.

Earlier in Chapter 3, it is shown that the Malaysian Immigration Act 1950 contains a provision that makes it an offence for anyone to enter and leave Malaysia through unauthorised entry points;⁷⁶ and to enter and stay in Malaysia without valid permit. The penalty for such offences includes fines and whipping and also removal and deportation.⁷⁷ Also discussed earlier in Chapter 5 the content of the *NR* principle prohibits states to return an asylum seeker or refugee to a territory where there is a risk of being persecuted and when he/she has no valid travel document or has entered a country illegally, penalty should not be imposed. These two positions are in complete contradictions. Does this means that the principle of *NR* is inapplicable in Malaysian courts?

⁷⁶ Immigration Act 1959/63, Section 5.

⁷⁷ Immigration Act 1959/63, Section 6.

From one perspective, this inconsistency can be used by the authority to deny its obligation under the principle. The provisions of the Immigration Act 1950 may be used to invalidate any attempt to invoke the principle of *NR* in Malaysian courts. If the court is to follow the finding in *Norogne*, there is a possibility that the principle of *NR* will be a futile method to safeguard children from deportation or removal from Malaysia.

A number of immigration provisions are inconsistent with the principle of *NR*. This makes Malaysia in violation of international law both because of its obligation under the customary international law as well as its position as a state party to the CRC. Section 7, 8 and 9 of the Immigration Act 1956 that make the entry into and stay in Malaysia without valid permit as an offence would not operate to invalidate the entire principle of *NR* and its content. The researcher suggests that even though domestic law will prevail over customary international law, the specific rule should not nullify the generality of protection under the *NR* principle. As the principle of *NR* consists of several obligations on the part of the receiving state, the obligation remains and must be carried out unless they are specifically and expressly made invalid by any domestic law. As such, provisions of the Immigration Act 1950 are not able to nullify every specific content of the *NR* principle for example state duty to determine whether a person is a refugee or not especially when they have valid document or has not violated any of the immigration rule. It must be borne in mind that a state responsibility towards asylum seeking children commences the moment the children attempt to enter the state's territory or jurisdiction. In these circumstances, four categories of asylum seeking children can be identified and their rights to *NR* in Malaysia's territory, if inconsistent law exist, will vary.

First, children who have valid travel document and valid permit and enter the country legally through authorised entry port; second, children who have valid travel document but without legal entry permit, and enter the country through illegal port; third, children who neither have a valid travel document nor the permit and entered through unauthorised port of entry; and lastly, children who are already in the country but have no valid travel and identity document because they are born in Malaysia but whose parents or parent are in Malaysia illegally or without valid permit. Based on the legality of their presence and offences committed, each group is then entitled to different rights or treatment guaranteed under the principle of *NR*.

For children who present legally in Malaysia, no doubt they are entitled to the full protection of the principle of *NR*.⁷⁸ Full protection of *NR* at customary international law means that a person seeking asylum cannot be rejected, returned, or expelled in any manner if this would compel him/ her to remain or to return to a state or territory where there is a threat of persecution or to life, physical integrity or personal liberty. No limitation or exception should be allowed unless for overriding reasons of national security or public safety and this must be carried out in accordance with due process of law and that reasonable steps must be taken to secure admission of the persons to a safe third country.⁷⁹ In order to grant protection to the group, the children must be screened to determine their claim of being persecuted or tortured and if this can be positively confirmed, the protection against return shall take effect. Prior to

⁷⁸ As discussed in Chapter 5. ⁷⁸ McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, London 2007)

⁷⁹ As suggested in Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 72.

the screening, so long as they possess a valid travel document and permit, they cannot be rejected at the frontier when they first arrive at Malaysian border.

The second and third group, due to the nature of their arrival and entry that have violated provisions of the Immigration Act 1950, they will not be protected from removal and deportation but the authority should take all reasonable steps to secure admission to a safe third country as guaranteed under the *NR* protection⁸⁰ which prohibits return to a territory that might put the children at risk of persecution. This is also the position of persons to be removed due to overriding reasons of national security or public safety.⁸¹

Children of the fourth group presented the most complicated position especially when the country of origin of their parents cannot be established. Children in this group will remain in legal limbo as they cannot be removed or deported. However, while remaining in this country, these children may not enjoy the rights as asylum seeking children or refugee children because they have no document to prove their identity.⁸² Whenever their illegal presence can be proved together with their state of origin or place of last transit, these children will be exposed to the danger of removal and deportation. Sadly, in this situation, because their presence is

⁸⁰ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non- Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 72.

⁸¹ Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non- Refoulement*: Opinion' in Erika Feller, Volker Turk & Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, UK 2003) 72.

⁸² Stateless children in Sabah fall under this category. See for instance Sothi Rachagan, *op. cit.*, 253, 260; and T S Bahrin, and S Rachagan, 'The status of Displaced Filipinos in Sabah: Some policy Considerations and Their Long Term Implications' in Lim Joo-Jock Vani, S, *Armed Separatism in Southeast Asia* (Institute of Southeast Asian Studies, Singapore 1984) 190, 192.

inconsistent with the Immigration Act 1950, the rule of *NR* is incapable of protecting them from removal and deportation by the Malaysian authority.⁸³

7.4.4. Exemption in Legal Provision as a Defence to Inconsistency?

Section 55 of the Immigration Act 1957 gives the Director General the power to make a declaration to exempt a person or group of persons from any provisions of the Immigration Act 1957. Such exemption shall be made in a form of regulation. If asylum seekers and refugees regardless of the legality of their presence in Malaysia are exempted under the Act, they may be entitled to the protection against return and they may be saved from deportation, detention and whipping. However, so far, no exemption order and regulation has ever been made in relation to asylum seekers and refugee. The question is, will an exemption clause of the Immigration Act 1950 function to reduce the scope of the Act or the effect of any provisions? Is it the intention of the Parliament to make section 55 to be considered as having the exemption effect when it is not already utilised? Since this is not expressed anywhere in the Act, such stand is baseless. To claim such general implication will only cause ambiguity.

It is undoubtedly the intention of the legislature to give the Act its full force, and the exemption to be made under section 55 must exist in the form of regulation for it to have a legal force. To suggest that provision of section 55 is actually a leeway or a backdoor for asylum seeking children is incompatible with the principle of rule of law underlying the promulgation of the Act that it should be clear and able to guide the people. Thus, section 55

⁸³ Deportation and removal of children of this group is a difficult exercise and many of them are still roaming the street of Sabah. See Camilla Olson. 13th of June 2007. "Malaysia: Undocumented Children in Sabah Vulnerable to Statelessness". *Refugees International*. www.refugeesinternational.org (Accessed 3 July 2012).

is of no significant to enable the application of the principle of *NR* except where the exemption has been expressly granted under any regulation of the Immigration Act 1950.

7.5 THE APPLICATION OF THE PRINCIPLE OF THE BIC

Unlike the principle of *NR*, which is considered alien in Malaysian statutes, the term BIC is a salient feature in laws relating to children and families in the country. Judicial application of this principle in Malaysian courts is common and can be found in many case laws especially in custody cases but its application in cases relating to refugee children are nowhere to be found. The only reported case involving a minor asylum seeker is *Iskandar v PP* in which the charge against a boy aged 17 years old for violating the provisions of the Immigration Act 1950 for illegal stay was then retracted by the Public Prosecutor because there is evidence to prove that the boy is indeed a recognised refugee under the UNHCR mandate and has an identity card issued by the UNHCR Kuala Lumpur office.

Nevertheless, it is interesting to envisage the outcome of the case if the charge was not retracted. Will the court make the BIC as the primary consideration? In a situation where the charge persists and the boy was convicted and then sentenced according to the Immigration Act 1959/63, can the boy apply for judicial review on the basis that the court in reaching its decision has failed to make the BIC as a primary consideration? It is thus imperative to find out whether the Malaysian court is ready to allow a judicial review when a decision affecting a child seeking asylum or a refugee is made without giving the BIC the primary consideration. It is believed that by giving the principle of BIC a primary consideration, refugee children will enjoy better protection as opposed to without the consideration at all.

7.5.1 Customary Rule of BIC as Common Law of England?

The principle of the BIC is a commonly applied principle in England. In a study, Kohm explains that the Custody of Children Act 1839 brought the doctrine of Tender Years into common law tradition in England, which is a departure from paternal inclination in custody over mothers.⁸⁴ Although the term BIC is not used, it was presumed that the principle underlines the belief that '*it was in the best interests of a child of tender years, to be in the custody of its mother*'.⁸⁵ This explanation is sufficient to show that the principle is indeed part of common law of England and this principle is codified into various legislations including the Borders, Citizenship and Immigration Act 2009. Section 55 of the Act requires UKBA caseworkers to safeguard and promote the welfare of children when making decision concerning the children. Thus, a guide entitled 'Every Child Matters- Change for Children' was introduced.⁸⁶

7.5.2 Consistency of the Principle of the BIC with Malaysian Law

As discussed in Chapter 6, the principle of the BIC that developed into customary international law requires that states and its organs must make the principle as the underlying basis in all actions and decisions that might have implications on children even when it is not provided under the law.⁸⁷ Even though the application of the principle so far is confined to limited legislations and type of cases, the customary status of the rule or the principle has

⁸⁴ Lynne Marie Kohm, 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' (2008) 10 J. L. Fam. Stud. 337, 347.

⁸⁵ Lynn D. Wardle & Laurence C. Nolan, Principles of Family Law (2002) 858 in Lynne Marie Kohm, 'Tracing the Foundations of the BIC Standard in American Jurisprudence' (2008) 10 J. L. Fam. Stud. 337, 347.

⁸⁶ UKBA, Every Child Matters, Change for Children, UK Border Agency (2009) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/bci-act1/change-for-children.pdf?view=Binary> accessed 5 June 2011.

⁸⁷ Article 3, UNCRC

made it applicable in all matters related to children and this shall mean to include refugee children. Unless a contrary legal provision or decision of the court of the highest level can be shown, the principle should be legally applicable.

Judicial application of this principle means that an application for judicial review by an aggrieved persons, in this situation refugee children or their guardian acting on behalf of children, can be allowed if states through its organs are found to have failed to make the BIC the primary consideration before any action is taken or any decision affecting children is made. Making it a primary consideration means that a child's best interests must be made as one of the first consideration.⁸⁸ In judicial review applicant may apply for quashing order, prohibition, mandamus, declaration, injunction and damages as the case may be. Certainly, if the consideration is required under a statute, the court owes the duty to do so and the failure would render the decision invalid and subject to appeal.⁸⁹ In instances where the court is not expressly required to do so, the court is bound under customary international law to adjudicate matters that might have impact on children (including refugee children) to make the BIC as the primary or first consideration among other considerations. This study is suggesting that when the court is considering the case of illegal entry and stay of refugee children and their parents for instance, the court must also make the principle of the BIC as the primary consideration because this might lead the court to a different outcome.

⁸⁸ Jean Zermatten, "The BIC Principle: Literal Analysis and Function" (2010) 18 Int'l J. Child. Rts. 483, 490.

⁸⁹ Jean Zermatten, "The BIC Principle: Literal Analysis and Function" (2010) 18 Int'l J. Child. Rts. 483- 499, 489.

We will now assess if there is any legal obstacles in applying the customary law principle of the BIC in the occasion where the principle is not expressly imposed by the law/ statute. However, the researcher is aware that it is not possible to discuss the application of the principle in every child related cases other than selecting to discuss potential cases that may arise under the Malaysian Immigration Act 1959/63.

7.5.3 Breach of the Best Interests Principle in Cases under the Immigration Act 1959/63.

A breach of the Immigration Act 1959/63 is a criminal offence and the trial of offences under the Act will be carried out at the Session Court or the court of first class Magistrate.⁹⁰ As for children, they will be charged at the Court for Children. Nevertheless, there is no requirement under the Act that requires cases involving child accused/ offender should be treated with the principle of best interests.⁹¹ However, such absence does not prohibit the court from applying the best interests rule especially where no direct and express prohibition can be found.

Judges or magistrate sitting for immigration cases involving refugee children are bound to make the best interests of the refugee child as the primary consideration before other considerations in making a decision affecting the child.⁹² The rule may help to avoid refugee children from being sent to prison or detained with adult prisoners/ offenders. It may also help to prohibit the removal or deportation of the child by the authority to a territory where there is a risk of persecution. This is because as children, detention in whatever form is definitely against their best interests and bears negative implication and as refugees, return and

⁹⁰ Immigration Act 1959/63, section 58.

⁹¹ This is further discussed in 7.5.3. below.

⁹² Jean Zermatten, "The BIC Principle: Literal Analysis and Function" (2010) 18 Int'l J. Child. Rts. 483, 489.

deportation will expose them to the risk of being persecuted again and will complicate their already complex situation.⁹³ Even though the application of the principle in refugee related cases is yet to take place or to be reported in Malaysian courts it is believed that the consideration of the principle will benefit refugee children as can be seen in a number of case laws in the UK, Australia and other countries as shown in Chapter 2, 5 and 6.

The Supreme Court decision in the case of *ZH Tanzania*⁹⁴ defines the BIC as it applies to immigration cases in the UK. Detailed discussion on the application of the BIC rule in this case can be found in 2.3.2. Here, the court had to deal with the question of the weight to be given to the best interests of children who are affected by the decision of the authority to remove or deport one or both parents from the UK.⁹⁵ The mother in this case was ordered to be removed from the UK and the Court of Appeal was of the view that the children (aged 9 and 7 years old) can choose either to live with their father (who is HIV positive) or to leave the UK and live in Tanzania with their mother. On appeal, it was argued on behalf of the appellant that insufficient weight was given to the welfare of all the children who are British citizens. Such failure is incompatible with the children's right to family and private life as guaranteed under the CRC to which UK is a state party. Lady Hale in delivering the leading judgment stated that:

“In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means that they must be considered first.”

⁹³ Crawley H and Lester T, *No Place for a Child: Children in Immigration Detention in the UK – Impacts, Alternatives and Safeguards* (Save the Children; UK 2005) entre

⁹⁴ [2011] UKSC 4

⁹⁵ [2011] UKSC 4, 6.

The case of *Rodrigues Da Silva, Hoogkamer v Netherlands*⁹⁶ was cited in *ZH Tanzania* case for its acknowledgement of the importance of the principle of the BIC in considering cases involving children trapped in the predicament of their parents. It was also noted that in *Neulinger v Switzerland*⁹⁷ the court stated that:

“...there is a broad consensus- including in international law- in support of the idea that in all decisions concerning children, their best interests must be paramount.”

Just as the case of *Rodrigues Da Silva* and *Neulinger*, based on the principle of the best interests of the child, the mother who appealed in *ZH Tanzania* will not be returned to Tanzania. It is clear that the principle should be applied when children are at the centre of the trial and when the children are affected with the decisions to be made about their parents or other persons who might have negative implication on the children.

7.5.4 The Best Interests Principle to be Applied in Immigration Cases Tried in the Courts for Children

Meanwhile the Child Act 2001 governs the manner in which children alleged to have committed an offence are to be treated in the criminal justice systems. The composition of the Court for children is a Magistrate assisted by two advisers. Thus, the court for children is an equivalent and suitable forum to try a child charged with an offence under the Immigration Act 1959/63.⁹⁸ Section 83 (1) of the Child Act 2001 states that a child who is alleged to have

⁹⁶ [2006] ECHR 26

⁹⁷ [2010} ECHR 1053

⁹⁸ Moreover the Child Act 2001 provides that the Court for Children shall have the power to pass sentences within the jurisdiction of the Session court. See Section 83 (2) (c); 91 (1) (h).

committed an offence shall not be arrested or tried except in accordance with the Child Act which provide special procedures concerning children.

The criminal procedure for the Court for Children provides that children arrested with or without warrant shall be brought before the Court for Children within 24 hours⁹⁹ and the Court shall consider the BIC in deciding whether a child should be kept in custody or allowed bail.¹⁰⁰ However, the Act did not specifically provide for the consideration of the BIC in the passing of sentences when a child is found guilty of an offence.¹⁰¹ As expressly provided under the Child Act, the principle is applicable in cases relating to children in need of care and protection¹⁰² such as children victims of abuse¹⁰³ and cases involving children in need of protection and rehabilitation for example children who are being induced to perform sexual act.¹⁰⁴ Nevertheless even without any express authority, the BIC should be made the primary consideration based on the direction of the Act in making decision regarding children in need of protection, care and rehabilitation. This is line with the preamble of the Act that declares that:

“Recognizing every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status.”

This study is of the view that the term ‘status’ shall include offender and non- offender status which in effect will require the court to provide protection and assistance in the form of

⁹⁹ Child Act 2001, Section 84 (1).

¹⁰⁰ Child Act 2001, Section 84 (3).

¹⁰¹ Child Act 2001, Section 91.

¹⁰² Child Act 2001, Section 30 (5).

¹⁰³ Child Act 2001, Section 17.

¹⁰⁴ Child Act 2001, Section 38 (a).

considering the BIC when passing a sentence. Apart from complying with the customary rule of the principle, most importantly, making the BIC as the primary consideration is compatible with the requirement of the Article 3 of the UNCRC. Though the UNCRC has not been fully translated into our domestic law, Malaysia has the obligation to act in the manner that is not contrary to the provisions of the UNCRC since it is the responsibility of state parties not to do anything inconsistent with the provisions of the UNCRC. Children in this respect have the legitimate expectation that their presence in Malaysia will be dealt with in a manner consistent with the principle of the UNCRC. This was so decided in the case of *Minister of State for Immigration and Ethnic Affairs v. Teoh*.¹⁰⁵ Furthermore, Malaysia does not make any reservation to Article 3 of the UNCRC.

Based on the Federal Court's opinion in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] that perceives that judges can choose to follow the development in the common law of England, and the decision in *Jamil Bin Harun V Yang Kamsiah & Anor* which views the development as persuasive, it open for the court to apply the principle of BIC when considering immigration cases involving refugee and asylum children.

7.6 THE IMPLICATION OF COURT'S RECOGNITION OF THE PRINCIPLE OF NR AND THE BIC

The principle of NR and the BIC(including in refugee and immigration cases) have been recognised in domestic courts in many jurisdiction even when the authority attempt to reject obligation under the principles by denying the existence of such rule or its binding effect on

¹⁰⁵ (1995) 128 A. L. R. 353.

the authority and thus its applicability in domestic courts. The recognition can be seen in many reported cases including the famous *C* case of Hong Kong and the recent *ZH Tanzania* case.

In *C*, the court ruled that UNHCR role in registering and processing the asylum application is not a sufficient discharge of state's duty to provide refugee screening since the UNHCR determination is immune from judicial review and such would cause adverse effect to the applicants.¹⁰⁶ Thus, the duty under the *NR* principle was not fulfilled. Even though the court acknowledge the finding by earlier courts that the principle of *NR* has become customary international law,¹⁰⁷ it refused to address the issue of whether the *NR* principle is a common law as claimed by the counsel for applicants since the court has already found a basis to make a decision to allow judicial review.¹⁰⁸

The court in *ZH Tanzania* made it clear that realising the BIC involves making the best interests as a factor rank higher than any other but not necessarily prevail over other considerations.¹⁰⁹ This factor must be applied in the event that children are directly and indirectly affected. If the application of the principle results in a particular direction or course of action, it must be adhered to unless an extensive force compel towards a different path.

¹⁰⁶ *C v. Director of Immigration* [2013] 4 HKC 563, 576-577.

¹⁰⁷ *C v. Director of Immigration* [2013] 4 HKC 563, 575.

¹⁰⁸ As per Ribeiro PJ, para 57-58, *C v. Director of Immigration* [2013] 4 HKC 563, 576-575.

¹⁰⁹ [2011] UKSC 4, 10

The recognition of the *NR* rule and the best interests rule will challenge the validity and suitability of state conduct in dealing with refugee children to international standard. This will comprise how children are treated at the border, their arrests and detention, and deportation including the deportation of their parents and care giver. Not wanting to commit contempt of court or face further legal action in the court, state will gradually improve their system and framework.

7.7 CONCLUSION

The central concern of many debates relating to domestic application of international law is state sovereignty but the protection of human rights in international plane requires some sort of state tolerance to intervention rather than treating it as an attack to its dominion. There is conclusive evidence that customary international law is theoretically applicable in Malaysian courts because of its common law status. However, the main obstacle identified, is to convince the court of the existence of the customary rule of *NR* and the BIC and that they are common law of England during the cut-off date. Analysis of the judgement in a number of Malaysian cases suggests that there is a possibility that the *NR* principle can be applied by the courts if the court is willing to adopt a liberal approach as in *Saad Marwi* and *Chan Ah Moi*. Nevertheless, there are also reasons to concern that the court will approach it from restrictive point of view as in the case of *Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* or refuse to address a lacuna in domestic law.

Local cases discussed above have shown that the Malaysian judiciary has been reluctant to use and apply customary international law in the adjudication of domestic disputes except for

a limited number of established rules such as the diplomatic immunity. Reasons for not allowing the customary international law to take effect lie with the argument that a particular customary rule has not been sufficiently proved or that there are existing domestic laws which are inconsistent with the customary rule that inhibit its operation domestically. To rely on the common law to allow the application of the customary international is also problematic as there is a need to prove that the individual principle is a common law in England before the cut-off date.

The limitation that have affected the full application of the *NR* principle could be removed if Malaysia is willing to amend its immigration law or to utilise the power of making a regulation to exempt refugees and asylum seekers from offences commonly associated with their presence. Meanwhile, the making of the BIC as a primary or first consideration in any matters affecting children is believed to have positive effect on the protection of refugee children as demonstrated in a number of case laws from other jurisdictions. So far, the courts in Malaysia have not played a significant role in the development of international law. Previous attempt to convince the court to apply customary international law in most cases but it was also proved that some strategy will work. In the wake of globalisation and the wider awareness that the public has about the plight of refugee children, we believe that the judiciary will notice the legitimate call to apply customary rules. Thus, this study believes that clear, strong and convincing argument will promote the court to make a drastic change in deciding Malaysia's stand about customary international law.

CHAPTER 8

CONCLUSION

8.1 INTRODUCTION

It is crucial to mention that this study has been launched from the pressing need to find out why is the condition of refugee children in Malaysia remains problematic and what can be done to improve the legal protection despite the legal impediments that exist. The following findings are pertinent in answering concerns about the deficiency of Malaysian laws in relation to refugee protection and Malaysia's responsibilities in the protection of refugee children in the country. This study is crucial for highlighting the plight of refugee children. It is also relevant in assisting the authority to devise a long term solution for protracted refugee problem. Most importantly, due to the scarcity of literature on these issues from Malaysia's point of view, it is believed that this study will contribute to the body of knowledge on refugee children and international law in Malaysia and contribute to any on-going studies on these areas. This chapter will point out four important aspects: first, the most significant finding of this study; second, how has the study contributed to the body of knowledge; thirdly, future research, and lastly how this study relates to the current situation of refugee children in Malaysia.

8.2 RESEARCH FINDING

8.2.1 Finding On The Treatment And Problem of Protection Of Refugee Children In Malaysia.

Generally, the authority has been tolerant to refugees and asylum seekers by allowing them to stay in Malaysia temporarily and enjoy some public services at discounted rate. Nevertheless, the condition of refugee children in Malaysia is clearly not as good as refugee children who found themselves in developed countries but in many ways, the treatment of refugee children in Malaysia can be improved if the authority is ready to commit to international obligations and thus comply with its requirement. Unfortunately, the yearning to see Malaysia to respect the rights of refugee children is being impeded by various causes including those claimed by the government as obstacles but which are not being tested or proven yet.

Regardless of the length of time that refugees have been present in Malaysia, from time to time, the authorities assert that Malaysia has no duty to accept and protect refugees and that it will only offer temporary refuge on humanitarian grounds and as part of its charitable consideration. This sentiment has resulted in a lack of appreciation of refugee rights and of how refugees can exercise and enjoy their rights, especially those rights that are granted and guaranteed under international law. By being admitted to Malaysian territory under various constraints, the refugees are in fact not granted meaningful rights and when the treatment of the parents and family has its inevitable impact on the children, this will lead to the further denial of those children's rights.

Irrespective of the various approaches taken or policies introduced in dealing with refugees, Malaysia's mistreatment in practice in dealing with refugee children should never be taken lightly or ignored. Legal protection of refugee children should be clearly and expressly envisaged in domestic legislation: failure to enact domestic laws to safeguard refugee children from violence, abuse, harm and neglect is a sure way of disregarding the importance of protecting refugee children's rights. Hence, it is unfortunate that refugee children continue to be in limbo as Malaysia is not a party to either the refugee convention (CRSR) or its protocol while the rights protected under the CRC are not restored or recognised. This means that the authorities are acting in a legal vacuum, allowing them to take actions and decisions concerning refugees and refugee children based on discretionary power. Eventually the power is not exercised properly. Instead of making regulations under a statute that will give a force of law, the authority made policies, the breaching of which have no legal effect.

This study also found that the principle of non- refoulement and the best interests of the child are being disregarded. The BIC especially, is not considered at any level of refugee presence in Malaysia. Policies and agreement entered into by the executive are one of them. In education, the Ministry of Education imposed the policy of requiring all children intending to enrol in public school to provide birth certificate. This policy has consequently caused many refugee children to stay away from or forced them to quit going to school because they do not have birth certificate either due to the condition in their country of origin or they were born to their refugee parents in Malaysian soil but fails to register the birth because the parents themselves are here illegally and they have no personal identification needed to register their children. It is also the role played by the executive for not proposing to the legislature to adopt

the CRC into Malaysian law that further jeopardise the protection of rights for refugee children as enshrined under the Convention. Under the CRC, state parties are required to take all possible measures to implement the provisions of the CRC. This can be done either by enacting a law declaring that the CRC is applicable in Malaysia or by making laws that incorporate the provisions of the Convention. Malaysia chose to incorporate some of the principles and provisions of the CRC in the Child Act 2001 but this is insufficient to offer meaningful protection for refugee children.

Meanwhile administrative bodies such as the police, immigration department and the attorney general's chamber enforce laws, which hampered the best interests of child. For instance, refugee children are detained or their parents are deported (after being arrested, imprisoned and charged) despite being in possession of the UNHCR identification papers that recognise them as refugees under the UNHCR mandate. Refugee women with infants are also detained at the immigration depot regardless of their condition and the welfare of the baby. The decision to charge/ prosecute or not to charge a refugee or asylum seeker for immigration offences lies with the Public Prosecutor¹³¹⁶ who has been inconsistent in their policy and practice. Refugees with UNHCR identification were initially assured that they will not be prosecuted for immigration offences even when they overstay but that is not the case in many instances leading to imprisonment and deportation. Most importantly, children charged with immigration offences are not tried at the Court for Children as provided by the Child Act 2001.

¹³¹⁶ Immigration Act 1959/63, Section 58 (2).

Another example is in relation to resettlement. By not allowing refugees to be resettled in this country except in certain circumstances and for certain groups, the authority is giving limited option to the UNHCR in their search for durable solution for refugee children. Even when resettling in Malaysia or local integration is the best option for refugee children having considered their attachment to this country for religious and cultural reason, the solution cannot be affected because it is our policy of not resettling refugees in our territory. Thus, Rohingya refugees are resettled in a third country such as Australia and European countries despite being Muslims.

Under the principle of the best interests of the child, the legislative body is also required to give the principle a primary consideration. This means that in its law making functions the Parliament should consider the implication of any laws that could adversely affect the best interests of the child. The Immigration Act 1959/63 is an example of a law that clearly has no regards for children or their best interests. The removal and deportation of persons including children under the Act because they enter the country illegally to a territory where he/ she will be at risk of being persecuted is contrary to the principle of NR. The Parliament has a duty to ensure that before it passes any law, the BIC is given the primary consideration, not a mere consideration. This can be done by questioning the implication of the law to be enacted during debates and question times.

In a judicial setting, asylum seekers and refugees charged for illegal entry and stay can face a fine of up to RM10,000¹³¹⁷ and imprisonment for a term of up to 5 years or to both. Offenders can also be removed from Malaysia. The removal to the territory where the person tried to get away from will expose him/ her to the risk of being persecuted again. It is highly recognized that if this is to happen to someone with family especially including children, the best interests of the children will be affected as they will be separated from their parent or parents for a long period of time and their basic need such as food and care can be disrupted. In a reported case, the court stated that its hands are tied and was bound to sentence the accused with imprisonment as the penalty is authorised by the statute and meant to be meted out when found guilty under the Act. Nevertheless, at the same time, the court also acknowledges the fact that the accused was persecuted in his country origin and had entered Malaysia for safety.

8.2.2 Findings On The Customary Status Of The Principles Of NR And The Best Interests Of The Child and Its Effect On Malaysia's Obligation.

It is claimed in some studies that states have a high regard for a good reputation in return for their compliance with their international obligations, and they consider reputation as a motivation to comply with international law along with the risk of sanctions for violating a rule. However, since sanctions in international law are to some degree restricted and very limited, breaches and violations do sometimes occur.¹³¹⁸ It is also suggested that states' power

¹³¹⁷ About £2,000.

¹³¹⁸ In Andrew T. Guzman, "A Compliance- Based Theory of International Law" (2002) 90 California Law Review 1823, the writer explains how international law influence states behaviour because of reputation and sanctions that results from its breach/ violation. Also see Andrew T. Guzman, "Reputation and International Law" (Feb 2008). UC Berkeley Public Law Research Paper No. 1112064. Available at SSRN: <http://ssrn.com/abstract=1112064>.

or the ability of one state to influence, force, compel or pressure another state (through various means) has a certain impact on states' behaviour and the process of customary international law.¹³¹⁹ As notably accepted, the binding effect of customary law is different from that of a treaty, which will only bind states that are party to it. However, a rule of customary law is applicable and binding even on states that never consented to the rule,¹³²⁰ or where no express consent has been given by a particular state to the rule,¹³²¹ or where a state has had nothing to do with the precedents nor participated in establishing the rule. Therefore, for a non-contracting state to the CRSR, such as Malaysia, customary rules can be used to compel it to follow certain rules concerning refugees. In determining whether Malaysia is bound by certain customary rules, no express consent from the country will be needed.

The role or the importance of customary international law in refugee protection is twofold: creating obligations to refugees for states that are not party to the CRSR; and as a component of the complementary protection mechanism for refugees founded on the principles of human rights. Other than conceiving obligation for non-contracting states, customary international law is very relevant in the protection of persons who cannot claim protection under the CRSR in contracting states. In this context, for a refugee who has failed to claim refugee status but who cannot be returned to the territory from which he/she has fled because of the risk and threat to life and liberty that he/she may face in that territory, a claim for protection under

¹³¹⁹ Michael Bryers, "Custom, Power and the Power of Rules: International Relations and Customary International Law (1999) 17 Michigan Journal of International Law 109. Further discussion on states self interests; and their perception of the interests of other states and distribution of state is made in Jack L. Goldsmith and Eric A. Posner, *The Limits Of International Law* (Oxford University Press, New York 2005).

¹³²⁰ North Sea Continental Shelf Case (1969) at p. 28.

¹³²¹ Hans Kelsen, *Principles of International Law* (New York 1952)311-313.

customary international law can be made. There are clear evidence supporting the customary status of the principle of *NR* and the BIC and its contents to some extent. There is also abundance of evidence to prove that Malaysia, from international law perspective is bound by the two rules and cannot claim that it is a persistent objector to the rule. As a result, the main duty that arise are the duty to provide a screening mechanism so that the authority will not make any decision or take action that are inconsistent with the two rules. UNHCR presence and the role that it plays in the refugee determination is not a sufficient replacement for real state duty under the *NR* rule, especially where the domestic law is not friendly for refugee children.

Even though the UNHCR has played a key role on providing protection and assistance for refugee children, this has proved to be insufficient because its power and mandate cannot fully give protection. The power is not recognised and often defeated by action and decision of the authorities. Thus, it is crucial for states to quickly take concerted effort between the executive, the legislative and the judiciary as isolated exertion will not produce the desired results.

8.2.3 Findings On The Applicability Of Customary International Law In Malaysian Courts.

Five conditions must be observed in the determination of the applicability of the customary international law in local courts.¹³²² The first condition is that the rule must exist and valid according to international law. Discussion in Chapters 5 and 6 have shown that evidence put forth in support of the customary status of the principle of *NR* and the BIC are immense and these have led to the overwhelming conclusion that such rules exist as universal norms. Second, the rule should be legally binding on Malaysia. Malaysia's position as the persistent objector to the two principles cannot be corroborated as it has not objected to the rule persistently during the formation until they became established and after that. The country in fact, as shown in Chapters 5 and 6, have a record of complying to the rules, never object its duty under the rules, and some contrary actions are deemed mere violations rather than objections.

Third, the rule must be clear, unambiguous, and concrete. Both rules under study have an established contents supported by state practice. Fourth, the rule is accepted as part of domestic law. In Malaysia, the acceptance can be proved according to the doctrine of incorporation. The reception of these two rules is possible through the application of common law. Lastly, national law prevails when there is an inconsistency between the rules. The rule cannot be applied if any domestic law operates to invalidate the rule or block it. It was found that provisions of the Immigration Act 1959/63 are inconsistent with the principle of *NR*. This

¹³²² Hannes Vallikivi, 'Domestic Applicability of Customary International Law in Estonia' (2002) *Juridica International* VII 28-38. This articles discuss essential prerequisites of domestic application of CIL in Estonia which provides a good model in discussing the same issue in Malaysia.

has become the trump card in the application of CIL in domestic courts in situation where an immigration offence has been committed. Provisions of the act have nullified the operation of the principle of NR. As for the BIC rule, the application of the principle can be made in the exercise of discretionary power of the authority because it is open for the administrative authority to make the BIC as primary consideration in making decision affecting children. It is also possible to persuade the legislature to make laws, which reflect the primacy of the BIC. Other than that, its application is still subject to express enactment in the legislation. The rule of the BIC finds no contradiction to written law or decision of the court of the final order. Thus, the rule is still binding on Malaysia to certain extent.

8.2.4 Findings on the Improvement of Protection For Refugee Children.

The fact that there are profound evidence to support claims that Malaysia is indeed bound by the customary international law rule of *NR* and the BIC as discussed in the previous chapters will not guarantee that refugee children will enjoy better protection unless the rules are applied in courts. Significantly, there is a reluctance to apply customary international law in Malaysian courts. The application does not only involves simple application, it also demands the judges to interpret the norms of international law and inevitably, this will involve considering a specific context, native norms and legal traditions.¹³²³ It is also notable that the question of international law has only reached the bench for a number of times only as compared to other states.

¹³²³ Karen Knop, "Here and There: International Law in Domestic Courts" (2002) 32 N.Y.U.J. Intl L and Pol 501, 505.

Judicial application of the principles under study as shown in many jurisdictions will contribute towards the enforcement of the two principles as executives, administrators and legislators are persuaded to comply with the decision of the court. Domestic courts are a suitable forum to achieve the objective of refugee protection regime. They have the capacity to influence the way refugee children are treated by the authority. In fact, the success of applying the principles in courts will make Malaysia a better place for refugee children than it is today.

The elusive position of children as rights holders can be gradually elevated to a more tangible one via judicial application of the rules customary international law in Malaysian courts. This suggestion works on the basis that it is impossible for Malaysia to become a contracting state of the CRSR in the near future and the delay to remedy the situation will only add to the refugee children's suffering especially those who are unaccompanied and this agony has long term effect on them. Reasonable and practicable measures that can contribute towards improving the protection and condition of refugee children such as proving Malaysia's duties under the principle of *NR* and the BIC and its applicability in local courts are more realistic and should be pursued. However, it is pertinent to note that judicial application alone is not adequate to offer better protection as refugee access to the legal recourse can be limited due to cost and awareness factor. The application of the two principles is fundamentally relevant for the executive and the legislative. As a matter of convenient, the legislator should first enact the law that will be followed and adhered to by the executive or the administrators. Through this, the principles can be applied more widely and consistently.

Lessons learnt from many studies demonstrate that law has different effect in different jurisdiction; the implementation and enforcement of law will give meaningful protection to refugees; and if enacting a new law is not possible, there are other means that can be utilised to compel states to observe international law and standards and thus, create better living environment for refugee children.

8.3 RECOMMENDATION

8.3.1 Strategic Approach and National Policy

Malaysia should plan a strategic approach to the reception, handling and care of asylum seeking and refugee children with particular attention to those who are unaccompanied and separated from their parents or adult carer. To improve the overall support for refugee children, there is a need to devise a specific national policy that can be implemented nationwide. But then again, policy is not hard law and it can be changed very easily or ignored without legal implication. Strategic approach will allow more systematic and coordinated means to protect and to deal with refugee children as it can involve various related authorities. For example, in the policy making, all relevant authorities and the public to some extent can get involved so that everyone is aware of what the other is doing. This can avoid future problems such as refusal of service simply because one authority is not aware of the other's policy.

8.3.2 Enact Specific Statute

An express law is always better than a policy because it will be able to guide the people clearly and expressly. If we were to abide ourselves to the rule of law, then the written law is

most appropriate because it will not easily be changed and the protection is clear without too much ambiguity as in policies. This study realises that law alone is not sufficient to correct everything which is not right about how refugee children are being treated in Malaysia. However, it can provide refugee children with voice to demand protection.¹³²⁴ It is recommended that Malaysia should enact a specific law to deal with refugees in general and refugee children in particular. In the exercise of his power under the Immigration Act 1959/63, the Director General can make rules and regulation to exempt refugees from the effect of criminal penalties under the Act. This can be monumental to refugee protection. The law may include the right of refugee to engage in gainful employment and thus help them from being exploited and assist them to be independent to survive.

8.3.3 Improve Cooperation with UNHCR

The UNHCR should be respected for what it already achieved for refugees and should not be perceived as a meddler. With better cooperation and mutual understanding, UNHCR can avoid doing unnecessary work such as intervention in court when a mandate refugee is charged for illegal stay. The authorities must realise that any attempt to discredit UNHCR work will not make the protection effective. Harmonious cooperation can lead to more transparent handling of refugee.

8.3.4 Set Up a Screening Mechanism

As refugee screening has been proved to be a state duty and one of the elements is to have an independent refugee screening body that is subject to appeal and judicial review. This can help the government to put away any suspicion that UNHCR is not working according to the

¹³²⁴ Kristina Touzenis, *Unaccompanied Minors Rights and Protection* (XL Edizioni, Roma 2006) p. 13.

procedures or against Malaysian Law. The refugee screening is the first step towards non-refoulement protection without which

8.3.5 Treat Children and Children First

It must be borne in mind that the utmost emphasis should be placed on improving the protection of refugee children by treating them as children first and refugee second. By subscribing to the principle, refugee children will be better treated as we are able to see their needs rather than identifying the problems they posed with their presence. The application of the *NR* principle and the BIC is among the first step towards treating refugee children as children. By applying the principle of the BIC we will arrive to a conclusion that all children in Malaysia are entitled to the same protection no matter what their immigration and citizenship status. Conferring similar protection and rights to all children will minimise the possibility of mistreating refugee children and other marginalised children because there is no need to differentiate between legal and illegal immigrant.

8.3.6 Adoption Of The UNCRC Through Enabling Act

The complexities in dealing with the status of refugee under Malaysian law could be partly alleviated if ratified international treaties can be directly applied on local circumstances. However, that is not the case here as reference to international law for the protection of refugee children is only viable through the incorporation of international treaties into national law by way of an enabling act adopted by the legislature for that purpose. Unfortunately for the CRC, this is very slow to take effect. Such sluggishness is the result of Malaysia's preference to incorporate provisions of the CRC into various laws and not adopting a specific

legislation or provision to adopt the whole CRC simultaneously.¹³²⁵ Hence, the court is only able to apply provisions of national laws contain selected provisions of the CRC without being able to observe the CRC provisions in full. Malaysia's position as a dualist state in relation to the rule of transformation of international law into national law together with the courts hesitation in applying the rule of customary international law have contributed towards the failure in giving effect to international treaties,¹³²⁶ and in relation to this study the Convention on the Rights of a Child and customary rules that could provide protection for refugee children.¹³²⁷ In fact, Malaysia's reservations to the CRC are indicators that it cannot fully conform to the CRC provisions.¹³²⁸

8.4 CONTRIBUTION TO KNOWLEDGE

Various issues analysed in this study have led to important contribution to the body of knowledge on the protection of refugee children in Malaysia. It is contended that the findings made so far may bridge some of the gaps left by the literature that I reviewed on Malaysia's obligation with respect to refugee children. Nevertheless I must note that issues on refugee

¹³²⁵ In Canada, a specific statute is enacted to fully adopt the CRC. Get other examples of state practice in the incorporation of law.

¹³²⁶ See Abdul Ghafur Hamid, 'Judicial Application of International Laws in Malaysia' in Asia- Pacific Yearbook on International Humanitarian Law' (Volume 1, University of Philippines 2005) 196- 214, 196, 197. For earlier works on the application of international law in Malaysia see Heliliah Bt. Haji Yusof, "Internal Application of International Law in Malaysia and Singapore" (1969) 1 Singapore Law Review, 62-71; and H.L. Dickstein, "The Internal Application of International Law in Malaysia: A Model of the Relationship between International Law and Municipal Law", (1974) 1 Journal of Malaysian and Comparative Law, 205-215.

¹³²⁷ Further deliberation on the rule of transformation of international law in Malaysian law and application of international law in Malaysian context will be made in Chapter 4.

¹³²⁸ Though Malaysia had enacted the Child Act 2001 which is based on the four guiding principles of the Convention on the Rights of a Child, the full implementation of the CRC in Malaysian law is not yet in place. See discussion in Chapter 4 regarding the concern of the Committee on the Rights of the Child regarding Malaysia's reservation and the slow pace in the enactment and law reform for the purpose of implementing the Convention. See CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention' CRC/C/MYS/CO/1 (25 June 2007)

children in Malaysia are not well represented in academic publication but its account in informal and non-academic publication is easier to locate.

What is already known is that many claims were made by commentators about Malaysia's obligation under the CIL. However, the claims were not substantiated and no actual assessment is made as to the escape route that Malaysia can take to evade the effect of customary international law. The rule of persistent objector is crucial in deciding Malaysia's obligation regarding international customs. This study has shown that the application of customary international law relating to refugees is not a direct and simple process. Many factors can affect the applicability of the custom. It is now clear that Malaysia cannot rely on persistent objector rule. Nevertheless, we now know that the principle of *NR* is inconsistent with Malaysian law to certain extent. We are also informed that the inconsistency should not annul the total effect of the *NR* principle. Fortunately for the principle of the best interests of the child, no contradictory provision or court's decision is found.

8.5 FUTURE STUDIES

With due limit in this study, a number of crucial issues still need to be addressed. Further study will help enhance the body of knowledge and lend support to refugee claim for protection.

8.5.1 The Cause of Action

It is interesting to find out the legal basis for children to take action against the authority. For example, how can children invoke their rights in the court or what is their cause of action?

Can a child apply for a judicial review when he or she is denied from going to public school without birth certificates? Further research on this area will enable refugee children to identify ways to seek redress and to protect their rights.

8.5.2 The UNCRC and Legitimate Expectation of Children

Issues of whether refugee children can claim ‘legitimate expectation’ should be researched further. Under the administrative law principle of legitimate expectation, a person can legitimately expect that the authority or the administrator is going to implement and enforce an international treaty that it ratifies or at the very least, the state is not going to perform a conduct which is contrary to the ratified treaties when the said treaty is not yet incorporated into national law. Even though legitimate expectation is not part of the argument to support the application of the customary principle of best interests of the child, this study contends that it is a useful argument to utilise the CRC and its guiding principles including the best interests rule. Other than claiming that the authority is bound by customary international law, and thus must apply the principle of the best interests of the child, legitimate expectation can provide a *locus standi* for asylum seeking children.

Under this presumption of legitimate expectation, the state’s ratification of a treaty is said to have given rise to a legitimate expectation which can be relied on by the public, especially refugee and asylum seeking children. In this regards, a person has a legitimate expectation, based on Malaysia’s ratification of the CRC, that he or she will be treated in accordance with

the principle of the BIC as provided under the CRC. The question that follows is, does the 'legitimate expectation' a legitimate argument to claim protection and rights under the CRC?

8.5.3 The Implementation Of The Principle By The Administrative Agencies.

The integration and assimilation of the principle of the BIC in every legal provisions, executive and administrative action and decision and judicial decision will require the adoption of appropriate measures by states and should be carried out continuously.¹³²⁹ Further studies on how the administrative agencies should implement two principles are important too. This will include argument on how authorities with relevant power and relevant services for refugee and refugee children can better serve the community.

8.6 CONCLUDING REMARKS

In conclusion, based on overall analysis, the researcher is able to conclude that the protection of refugee children in Malaysia can be characterised by inconsistency and uncertainty. The inconsistency is seen in the way different refugee group are treated while the uncertainty is found in the way the policies relating to refugees are implemented. Without doubt, children are affected not only because they are refugee but also because their parents are also refugees, thus refugee children are not able to rely on the protection from the family as well. It is clear that the initial step of protection for refugee children should begin by treating the gap in law since written law is more stable and can guide the affected individuals better than introducing and relying on policies, which is tend to be abused, not recognised, cancelled and not consistently implemented. Reliance on the policies and 'humanitarian gestures' as the

¹³²⁹ Karuna Nundy in the recommendation for legislative reform. See Karuna Nundy, *The Global Status of Legislative Reform Related to the Convention on the Rights of the Child* (UNICEF, 2004)

authority put it, has never put children in better position. Malaysia's practice is not based on the spirit of the UNCRC and children are not treated as children but as a threat to safety, social and economics when in reality refugee children are denied very basic rights such as the right to education and healthcare. It can be said that the authority is adopting welfare-based approach rather than rights based approach, and thus refugee children are perceived as welfare subject requiring charity services. However, amidst the criticism, there are a number of initiatives taken by the authorities which the researcher think has contributed positively to the protection of refugees. Nevertheless, its effort has been marred by the failure to respect the rights of refugee children even though the authorities sometime show certain degree of cooperative and supportive attitude to the refugee community and the UNHCR. Even though the government can provide as many justifications as they like to justify the refusal to ratify the CRSR, to recognise the work and contribution of the UNHCR, nothing could replace the damage and detrimental effect that children suffer. It is time for the government to change its paradigm of refugee children. Apparently, there is a pressing need to quickly fix the problem using a sustainable tool. The researcher believes that above all the reasons cited by the government, one is left unsaid, lack of commitment as a member of the United Nations; ASEAN; AALCO; Organisation of Islamic Conference that adopts the Cairo Declaration of Human Rights; state party to the UNCRC; and CEDAW who is responsible to protect and respect human rights. Since other legal recourse seems to be impossible, reliance on customary international law is a good alternative. However, in doing so we are posed with several problems especially to determine its content; qualification as common law principle under the Civil Law Act 1956; and to ensure its survival from more prevailing written law. The role of the judges in giving effect to the principles of customary law is important. The approach that a judge takes in deciding the applicability of the rule in courts will affect the

outcome. Since there is no final decision from the court of the highest authority on the applicability of the development of the common law after 1956, or when there is a lacuna, it is the duty of the legal practitioner to convince the court that such law is applicable for the benefit of refugee children who will otherwise do not have legal protection. The important thrust in making customary law work does not only lies with the judiciary but also the legislative and the executive and the administrative agencies.

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